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Supreme Court of the United States.

OCTOBER TERM, 1887.

Nos. 11 and 12.

De WITT, et al.,
Plaintiffs in Error,
vs.
Mc LAUGHLIN.

AND

FRIEND, et al.,
Plaintiffs in Error,
vs.
WISE.

BRIEF FOR DEFENDANTS IN ERROR.

A. L. RHODES,
Attorney for Defendants in Error

The Supreme Court of the United States.

OCTOBER TERM, 1887.

DE WITT,
Plaintiff in Error,
vs.
McLAUGHLIN,
No. 11.

AND

FRIEND,
Plaintiff in Error,
vs.
WISE.
No. 12.

Brief for the Defendants in Error.

These are actions of ejectment for the recovery of parcels of land, which were conveyed by the United States to one of the Pacific Railroad Companies, in accordance with the provisions of the Pacific Railroad Acts of July 1st, 1862, and July 2d, 1864. The lands lie adjacent to the line of the railroad, between Sacramento and Stockton, in the State of California, and are a portion of the lands included in the patents which are involved in the action of the *United States*, Appellants, vs. *Kate D. McLaughlin*, Appellee, No. 1027, October term, 1887.

The patent, which is set out in the bill of exceptions, in the first of these cases—the De Witt case—is in the usual form of the patents issued to the railroad companies under those Acts. It is regular on

its face, and conforms to the provisions of those Acts, and is sufficient in form and execution to convey the title to the lands therein described, and is dated July 21st, 1881.

In the second case—the Friend case—the patent is not set out in the bill of exceptions, but it is dated in 1881, and will be presumed to be in the usual form of the patents issued under the Pacific Railroad Acts.

The plaintiff in each case deraigned title to himself, under the patents to the railroad company.

The defendants do not connect themselves with the title in any manner whatsoever, nor do they claim title under the United States, or any grantor of the United States. They do not claim either a homestead or pre-emption right; but they claim that they attempted to acquire such rights.

In the De Witt case, the offer on the part of the defendants was to prove that they had entered into possession of the lands in 1879,—which was nine years after the title vested in the railroad company—that they possessed the qualifications of pre-emptors, and offered to file their declaratory statements, but were not permitted to do so.

In the Friend case, the defendants' offer was to prove that they possessed the qualifications prescribed by the Homestead Act; that they entered upon the lands, and made improvements thereon; that they presented to the local Land Office their homestead applications, together with the fees, but that their applications were refused. The times at which those things were done are not stated. The defendants in both actions are therefore naked trespassers, and mere intruders upon those lands.

I.

The Patent was Admissible in Evidence.

The first exception presented in the bill of exceptions was taken to the ruling of the Court, in admitting the patents in evidence. The objections were to the effect that the plaintiff had not shown that the lands were not reserved or disposed of by the United States, when the line of the railroad was definitely fixed, nor that at any time, the lands were public lands of the United States.

The exception cannot be sustained, for several reasons:

1st. The plaintiff is entitled to offer his evidence in such order as he may elect. If evidence of the existence or performance of con-

ditions was required of him, he might offer it at his election, either before or after the patent was given in evidence; and—if such evidence was necessary—it does not appear that such evidence was not introduced after the patent was admitted in evidence.

2d. The law raises the presumption that the patent was, in every respect, duly and legally issued, there being nothing on its face tending to show any irregularity in its issue. Upon this point the authorities are in harmony, and are very numerous. We cite only

Moffatt vs. *U. S.*, 112 U. S., 30;
Steel vs. *Smelting Co.*, 106 U. S., 450;
Smelting Co. vs. *Kemp*, 104 U. S., 640.

3d. The defendants being mere intruders, are not in a position to question the legality of the patent, on any of the grounds stated as objections to it. This question will be hereafter discussed, and it will be sufficient, at this time, to cite one of the most recently reported cases in this Court, in which this doctrine is announced.

Ehrhardt vs. *Hogaboom*, 115 U. S., 67.

II.

The Deed Executed by the Railroad Company was Admissible in Evidence, Upon the Admission by the Defendants, that it Bore the Seal of the Company.

The objection to the deed of the railroad company, on the ground that it was not proven that the company had authorized its officials to execute the deed, cannot be sustained. The lands were granted to the railroad company, with the intent that they should be sold and conveyed.

Pac. Railroad Act of 1862, Sec. 3.

The seal of the company, attached to the deed, was admitted by the defendants, and the seal proves the authority of the officials executing the deed.

Miners' Ditch Co. vs. *Zellerback*, 37 Cal., 596.

The opinion in that case was delivered by the Chief Justice of that Court—now the Judge of the U. S. Circuit Court. The ques-

tion is so thoroughly discussed in the opinion, and the doctrine announced is supported by such an array of cases cited, that we deem it unnecessary to produce additional authorities.

The plaintiffs were not required to produce authority to the officers of the corporation to execute the deed, before introducing the deed in evidence,—even if the seal did not prove their authority.

III.

The Defendant Cannot Sustain their Attack upon the Patent.

The third exception presents the ruling of the Court upon the offer of the defendants to prove that the patent did not convey the lands; and for this purpose they offer to prove that these lands were reserved by the United States, to satisfy the claim of Andreas Pico to the pretended Moquelamos Grant, from the year 1846, up to February 13th, 1865, when that grant was rejected by this Court as fraudulent; and that at the time of the definite location of the line of the railroad—which they assert was on January 23d, 1865,—the land was reserved to satisfy Pico's claim to the alleged grant. This offer was supplemented by the offer in evidence of the proceedings of Pico, in the Land Commission, and the District and Supreme Courts, for the confirmation of his claim; which claim was finally rejected by the Supreme Court as above stated. It was further supplemented by the offer of evidence to prove that the lands were withdrawn within the limits of 25 miles on each side of the railroad line, January 31, 1865, and that the plat of the township including these lands, was filed in the local Land Office in 1858. The offer included other matters which need not be mentioned at this time.

The offer of the evidence above alluded to was made for the purpose of proving that the patent issued by the United States to the Railroad Company did not convey the title to the lands.

The patent conveyed the title to the lands to the Railroad Company, unless the patent was void. If it was merely voidable, it did convey the title. It will be remembered that this is an action of ejectment—or, more accurately stated, an action in the nature of an action of ejectment—and in such an action, only the legal title is involved. If the patent be voidable, it may be annulled by a Court of Equity in an action brought by the United States, and upon the

proper allegations and proofs; but in an action of ejectment, the legal title prevails, and the patent is not subject to a collateral attack, upon the grounds that might be urged for its annulment in a Court of Equity; nor is it subject to such an attack by a private person.

The plaintiff was a purchaser of the title, which apparently passed to the Railroad Company under and by virtue of the patent, and he had the right to rely upon the presumption that "all the requirements preliminary to its issue have been complied with; that every pre-requisite has been performed." If the lands were public lands, and Congress had made provision for their disposition, then in an action at law, the presumption as to the regularity of the issue of the patent is conclusive. The patent in the Friend case was issued in 1870—five years after the final rejection of the pretended Moquelamos Grant, when the lands were unquestionably public lands, and more than eleven years after the plat of the survey of the township had been filed in the local Land Office; and more than five years after these lands, with others, had been withdrawn from private entry, pre-emption, etc., in pursuance of the provisions of the Pacific Railroad Acts, as appears by the defendants' offer of evidence. In the DeWitt case the patent was issued in 1881. These lands being public lands, and within the 25 mile limits of lands withdrawn to satisfy the grant to the Railroad Company, and within the 20 mile limits, measured from the line of the railroad as definitely fixed, the title presumptively vested in the Railroad Company, and the patents issued therefor, were *prima facie*, legal and valid. It certainly was not void, though it might have been voidable, and must, in an action at law, or in any action in which it is collaterally called in question, be held valid, and beyond the reach of such an attack as the defendants attempted to make upon it.

The defendants, as we have already said, are mere intruders; and whatever right the United States might have, in a proper action, in the appropriate Court, to attack the patent, it was beyond the reach of the defendants. Up to the time when they made the offer of evidence now under discussion, they had not attempted to connect themselves with the title; nor did they, in connection with this offer of evidence, offer or propose thereafter to connect themselves with the title. Their subsequent offer we will hereafter discuss; but it will be sufficient, now, to say that the offer only shows an attempt, in 1879, to acquire a pre-emption, or a homestead, upon the several tracts of

land; but that they failed to acquire anything but a naked possession of the land. They occupied no better position in respect to the title, than did the defendants in

Ehrhardt vs. *Hogaboom*, 115 U. S., 67.

The plaintiff in that case deraigned title through a patent of the United States. The defendant, conceiving himself authorized to redress the wrongs suffered not only by the United States, but also by the State, proceeded to take possession of the lands; and on the trial of the action, he offered evidence to prove that twenty acres of the lands in suit were swamp and overflowed land, within the meaning of the Arkansas Swamp Land Act of September 28th, 1850, and that by virtue of the Act, they vested in the State long prior to the issuance of the patent by the United States, under which the plaintiff deraigned title; but the defendant did not connect himself with the title to the twenty acres. His proposition was, that he was entitled to show that the land had vested in the State prior to the issuance of the patent, and that proof of that fact would show that the Land Department of the United States had no authority to issue the patent, and that for that reason the patent was void. This Court, in reviewing the alleged error of the Court below, in rejecting the evidence offered by the defendant to prove that the land was swamp land, and, under the Act, vested in the State, held that "he was, as to the twenty acres, a *simple intruder*, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it. * * * * A patent of the United States, regular on its face, cannot, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed, and therefore unfit for cultivation, and hence passed to the State, under the grant of such land, on her admission into the Union."

This case, like that, is an action of ejectment; in this case, as in that, the patent was regular on its face, and has the benefits of the presumption that it was issued in conformity with all the provisions of the law applicable to it and to the lands therein described. In this case, as in that, the defendants were mere intruders without title, and they offered evidence, the purpose of which was to prove that

the officers of the Land Department had not complied with the law in issuing the patent. The fact that in this case the patent was issued to a railroad company, while in that case it is issued to a pre-emption claimant, affords no ground for a different application of the doctrine of that case,—the doctrine that a mere intruder cannot, in an action at law, question a patent of the United States which is regular on its face, and does not appear to have been issued without the authority of law.

In that case the defendant offered parol testimony for the purpose of overthrowing the patent issued by the United States; and although the character of the evidence is more than once mentioned by the Court, we do not understand that the Court placed its decision upon that ground, but merely mentioned that circumstance, in giving an accurate statement of the facts of the case. Indeed, no point seems to have been made in respect to the character of the evidence offered by the defendant. In considering the question of the right of a mere intruder to make a collateral attack upon a patent, it would seem that its solution could not be dependent upon the character of the evidence—whether oral or documentary. The same principle which would exclude the testimony of witnesses going to show that the land was swamp and overflowed, would also exclude the map and field notes of a county surveyor.

Here the offer included not only documentary, but also oral testimony. Resort must necessarily be had to oral testimony, to prove the boundaries of the pretended Moquelamos Grant, and of Andreas Pico's claim. The calls of the pretended grant, however accurate they may have been—and this Court need not be told that accuracy was not one of the characteristics of Mexican grants—could not have been located on the ground, and perhaps could not have been ascertained, without the aid of oral testimony.

The offer of these defendants also included evidence that the lands are agricultural lands, and that they had not been inclosed or fenced, and that testimony must necessarily have been oral, and therefore was rightly excluded when offered by mere intruders. But we insist that it is immaterial whether the evidence offered was partly documentary or all oral; for the defendants, not connecting themselves with the title, and being mere intruders, had not the right to make a collateral attack on the patent.

IV.

The Action of the Land Department in the Matters Relating to the Issue of the Patent is Conclusive, Except When Directly Attacked by the United States.

This proposition is founded upon the well established doctrine of

Johnson vs. *Towsley*, 13 Wall., 72,

which has been affirmed in

Smelting Co. vs. *Kemp*, 104 U. S., 640;
Steel vs. *Smelting Co.*, 106 U. S., 450,

and many other cases,—to the effect that the Land Department constitutes a special tribunal, with authority to definitively determine all matters of fact that constitute pre-requisites—conditions precedent—to the issue of patents for public lands of the United States.

It would seem that the presumption that the patent was duly and regularly issued could not arise, unless the Land Department has authority to ascertain and determine the existence of the facts upon which the right to the patent depends.

The officers of that Department determine that the railroad company accepted the terms of the grant which was made by the Pacific Railroad Acts; that the map of the general route of the railroad was filed; that the map of the definite location of the line of the road was filed; that it was accepted as such by the Secretary of the Interior; that the railroad company reported the completion and equipment of the road, or the proper section thereof; that the commissions provided for by the Acts, reported that the road or the particular section was completed and equipped; that the lands along the line of the road were surveyed by the officials of that Department; that certain sections of the land were within the twenty mile limits from the line of the road and were odd-numbered sections; and that such sections came within the terms of the grant.

But it is contended, as we understand the defendant's proposition, that the Land Department did not possess the authority to determine, with the same conclusiveness with which it determined the other facts leading up to the patent, whether a particular odd-numbered section came within the claimed boundaries of a pretended Mexican grant.

The boundaries of a grant are not established by law, nor are Courts required to take judicial notice of them, as might be the case in regard to military or Indian reservations. The boundaries of an unconfirmed Mexican grant can be shown and established only by the production of evidence, and in the same manner that the boundaries of a farm may be proven. In other words, the boundaries of the grant, like those of any farm or tract of land, are matters of fact, to be established by evidence, and definitively found by the tribunal to which the issue is by law submitted.

It is well understood that the Land Department, in ascertaining what subdivisions of the odd-numbered sections came within the limits of twenty miles from the road, accept as the basis of measurement the township surveys made under the direction of that Department; and it is also well known that those surveys are only proximately—never exactly—accurate. If it were proposed in this Court to attack the patent to the railroad company as to a particular quarter section, on the ground that the twenty mile limits, *accurately measured* from the line of the road, would not include the greater part of the particular quarter section, we have no hesitation in affirming that the Court would reject the offer,—that the Court would hold that the action of the Land Department, in that regard, should not be subjected to revision and correction by the verdict of juries, based upon evidence which might vary on each trial. In such a case, it might appear that all the section and quarter section corners, between the line of the road and the quarter section in controversy, had been obliterated, and if the offered evidence were admissible, it would virtually result in causing the public lands to be surveyed by juries, instead of the Land Department. The Courts will not undertake to survey or re-survey the public lands, for jurisdiction in that regard has not been given to them, but has been conferred upon the Land Department.

The Act of Congress of August 31, 1852,—10 U. S., Stats., 90-1,—after appropriating a certain sum for surveying private land claims in California, contains this proviso: "*Provided* that the authority hereby conferred upon the Surveyor-General shall apply only to such unconfirmed cases, as in the gradual extension of the lines of the public surveys, he shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and surveyed in advance of confirmation." This is a command to to the Surveyor-General not to survey as public land, the land within what he should

determine were the lines of the unconfirmed claim. We do not contend that a survey made under that authority, whether of the unconfirmed claim, or of the adjacent lands, would preclude action by the tribunal or officers acting in proceedings instituted under the Act of March 3d, 1851, to settle private land claims in California, in ascertaining the bounds of a claim, upon or after its confirmation; but we contend that the action of the Surveyor-General is conclusive as to an unconfirmed claim; and if the claim be rejected as fraudulent, as in this case, the survey of the lands as public lands, lying near or adjacent to the claim, is beyond the reach of revision, except by his superior officers of the Land Department. The defendants, by their offer, proposed to prove that the map of the survey of the township, including these lands, was filed in the local Land Office in 1858. That survey, beyond all question, did not intrude upon what the Surveyor-General found or regarded as the bounds of the pretended grant.

The offer of the defendants included, among other things, the fact that the pretended grant was the same that was before this Court in the cases of

U. S. vs. *Pico*, 22 How., 406; and
Pico vs. *U. S.*, 2 Wall., 279.

Those cases show that the grant was fraudulent and void. They also show that there was no petition for the grant, no deseño of the land, no order of reference, no informé, and no possession of the land by the pretended grantee. There is nothing in those cases showing that the pretended grant was bounded by any objects, either natural or artificial, except the river, the name of which the manufacturer of the grant, because of his ignorance of the country, misspelled "Moquelamos,"—instead of "Moquelumne." If we might assume that the eastern boundary was the same as appears in the actions now pending in this Court, to cancel the patents, it would be "the adjacent mountains." The foregoing matters make it manifest that the bounds of the pretended grant are uncertain—that is, all except the Moquelumne river. In such case it would be the duty, not only of the Surveyor-General, in surveying the adjacent lands, to ascertain the boundaries of the pretended grant—as proceedings were pending for its confirmation—but it was also the duty of the Land Department to ascertain those bounds, when making up the lists of the

lands to be patented to the railroad company—that is to say, such was the duty of that Department, if it was *true* that the map of the definite location of the line of the road was filed *prior* to the final rejection of the pretended grant; but such duty would not devolve upon the Department, if the map was filed *after* the rejection of the pretended grant. No reason occurs to us, and none has ever been suggested, so far as we know, why the ascertainment and determination of that fact by the Land Department, is not as conclusive as its determination of any other fact preceding the issue of the patent,—such as the filing and approval of the map of the definite location of the line of the road, or that a particular subdivision of an odd-numbered section is within the limits of twenty miles from the line of the road.

The law does not contemplate the issuing of patents by the Land Department, and the *subsequent ascertainment* by the Courts as to whether the lands therein described come within the terms of the grant; but, on the contrary, the intent of the law is, that the Land Department shall, before issuing the patents, ascertain and determine the existence of *all the facts* upon which the patents are based. The rule for which we contend, would not make valid a patent for land reserved by Congress, by an execution order, or by treaty with an Indian tribe; but such a case bears no relation to the one at bar.

The position for which we contend must be sustained by the Court; otherwise there would seem to be no end to this litigation. It is not enough to say, as was said in

French vs. *Fyan*, 93 U. S., 169,

when it was attempted by such evidence as was here offered, to overthrow the determination of the Land Department, by showing that the land was not swamp and overflowed, and as was repeated in

Ehrhardt vs. *Hogaboom*, 115 U. S., 99,

where, in opposition to the determination of the Department, it was attempted to be proven that the land was swamp and overflowed—that "it would be substituting the jury, or the Court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would make a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey;"

for here the claim was for eleven leagues of land, to be taken from a much larger area, and while one jury might find one parcel of land to be within the boundaries of the pretended grant, the next jury might find another parcel similarly situated, as regards the boundaries of the grant, and the line of the railroad to be without those boundaries, and this process may be repeated as to each subdivision of land. The application of the certain and wholesome doctrine of *Johnson* vs. *Towsley*, will save the patents of the United States from such a disastrous defeat, and will preserve the respect due to the conclusive determinations of matters of fact coming within the jurisdiction of the Land Department.

V.

The Offer of Evidence to Prove that the Defendants Made Applications to Enter the Lands Under the Pre-Emption and Homestead Laws, was Properly Refused.

In the DeWitt case, the offer was to prove the presentation of pre-emption declaratory statements in 1879; and in the Friend case, of homestead applications, without stating the time, and to prove that they were all refused by the local Land Office.

These applications were made a long time after the title of the Railroad Company had attached to the lands, and they were incompetent and immaterial; for they did not tend to prove title or right of possession, in the defendants. They did not connect the defendants with the title, or in any respect put them in a position to enable them to attack the patent.

VI.

The Motion to Dismiss the Action was Properly Denied.

The motion seems to be based on the idea that as the Court acquired jurisdiction of the actions, on the ground that the defendants denied the validity of the patents, the Court, by its rejection of incompetent evidence offered by the defendants to sustain their attack upon the patents, divested itself of jurisdiction to complete the trial of the actions. Upon that theory of the law, the actions would necessarily be dismissed, if the defendants offered no evidence.

VII.

The Charge of the Court.

It is unnecessary to consider the charge of the Court. The questions presented in regard to it are all involved in the questions as to the admissibility of the evidence offered in the attack upon the patent. If the evidence was properly excluded, the charge is unquestionably correct.

We respectfully submit that the judgments should be affirmed.

A. L. RHODES,
Attorney for Defendants in Error.

127-415

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

BRIEF OF HENRY BEARD, ATTORNEY FOR DEFENDANTS.

No. 11.

DE WITT AND OTHERS, PLAINTIFFS IN ERROR,

vs.

CHARLES McLAUGHLIN.

No. 12.

FRIEND AND OTHERS, PLAINTIFFS IN ERROR,

vs.

TULLY R. WISE.

From the Circuit Court of the United States for the Ninth Circuit for the District of California.

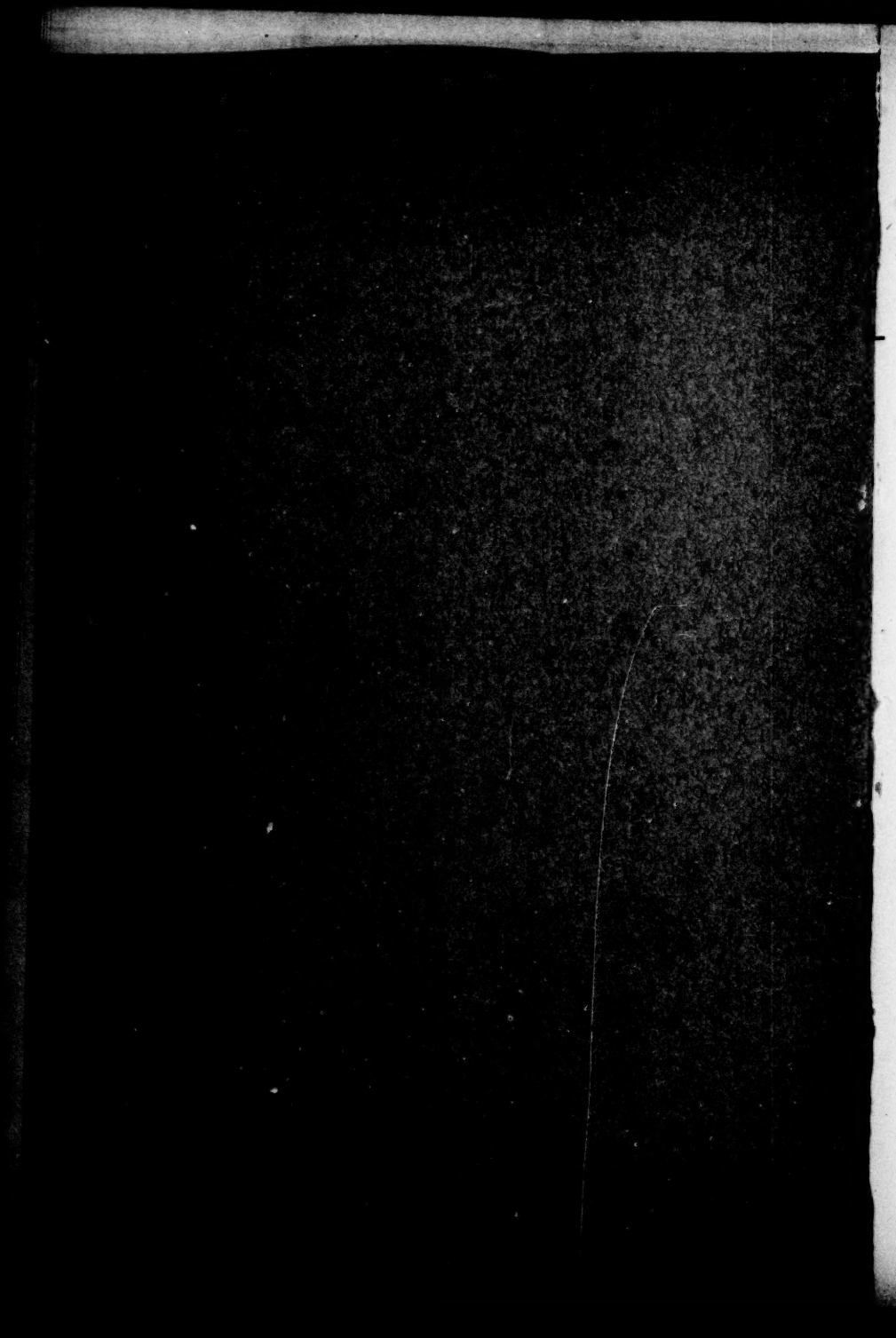
Cases Nos. 11 and 12 were postponed in accordance with a stipulation on file, to be considered with (or after) cause—

No. 1027.

THE UNITED STATES, APPELLANT,

vs.

KATE D. McLAUGHLIN, KATE D. McLAUGHLIN, EXECUTRIX OF CHARLES McLAUGHLIN, and others, from the same Court.



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STATEMENT OF THE CASES.

NOS. 11 AND 12.

Briefs for plaintiffs in error not having been received before the time this should be filed, a memorandum is needed to bring the cases before the court.

Charles McLaughlin filed his complaint in No. 11 in the nature of an ejectment, in said circuit court, March 14th, 1882, to dispossess the plaintiffs in error, De Witt and others, of the E. ½ of the N. W. ¼ and S. W. ¼ of section 5, and the E. ½ and E. ½ of the S. W. ¼ of section 7, in township No. 3 N. of range No. 10 E., Mt. Diablo base and meridian, California. (Record, pp. 2 and 3.)

The answer of defendants was filed 27th November, 1882.

Judgment was rendered in favor of McLaughlin for the premises, with damages assessed against each of the defendants, January 16, 1883. (P. 5.)

At the trial, January 16th, the plaintiff offered in evidence a patent from the United States to the Central Pacific Railroad Company, successor to the Western Pacific Railroad Company, conveying said lands, dated July 21st, 1881 (Record, p. 8), and said company conveyed its title to Charles McLaughlin August 26th, 1881. (Record, p. 9.)

The plaintiff having rested his case, the defendants offered to prove that "The lands in controversy, with other lands, "had been claimed and reserved as a part of a Mexican "grant (called Moquelamos) from the 15th day of June, 1846, "continuously until the 13th day of February, 1865, and on "the last-named day the said lands in controversy in this "action first became public lands of the United States, and for "that reason were not embraced in the lands granted by the "act of Congress to the Western Pacific Railroad Company, "and that the said patent issued therefor conveyed no title

"and was issued without authority of law, and is null and "void." (Record, p. 10.)

The plaintiff objected "on the ground that it is incompe-"tent and not admissible to contradict or attack the United "States patent, which is conclusive in this action.

"The court sustained the objection, and the defendants, "each of them, duly excepted;" which exception was allowed and noted by the court. (P. 11.)

The defendants each offered to prove facts requisite to establish pre-emption rights, alleging settlements in 1879, which was excepted to by plaintiff and the exceptions sustained by the court. (Pp. 12 & 13.)

The court charged the jury as follows (p. 14):

"GENTLEMEN: There is really but one issue of fact upon which there is any conflict in the testimony in this case, and that is the value of the rents and profits of these pieces of land. The plaintiff has put in evidence the patent of the United States, and claims title through that patent to himself. That shows the legal title in him; whether he has got it rightfully or not is not open for consideration in this case. If he has got it wrongfully, the remedy is elsewhere. There was a grant made to the Western Pacific Railroad Company of certain lands. There were certain officers appointed to ascertain whether these lands were in the grant or not. They have passed on that question and issued the patent. Their action is conclusive, so far as this case is concerned. The legal title, whether rightfully or wrongfully, is in the plaintiff in this case." * * *

The defendants excepted and the exceptions were allowed, and the verdict of the jury was rendered for the plaintiff according to the charge given them by the court.

The bill of exceptions was settled, signed, and filed February 28, 1883 (p. 16), and a writ of error allowed March 8, 1883, and citation issued March 9, 1883, and the record was filed in this court October 10, 1883. (Record, pp. 20 & 21.)

In case No. 12, Friend and others *vs.* Tully R. Wise, the

complaint and proceedings thereon are, in all important respects, similar to those in No. 11.

The complaint was filed by Wise in the court below May 25, 1882 (Record, p. 31), demanding possession of sections Nos. 5 and 9, in t'p 3 N. of R. 9 E., and sections 27, 33, and 35, in t'p 4 N., R. 9 E., Mt. Diablo meridian, for which the United States patent issued in 1870. (Record, p. 9.) [The date must be 1870 or later, for the patent recites an order of the Secretary of the Interior dated February 1, 1870.]

The lands in case No. 12 are in t'p 3 N., R. 9 E., and t'p 4 N., R. 9 E.

In case 11 they lie in t'p 3 N., R. 10 E.

In case No. 1027 the United States seeks to recover the title to the following tracts of land (Record, p. 5):

Fractions 7 and 9 of sec. 33, t'p 4 N., R. 7 E.

S. E. ¼ of sec. 7;

S. W. ¼ and W. ½ S. E. ¼ sec. 9;

N. W. ¼ of N. E. ¼, W. ½ of N. E. ¼ of N. E. ¼;

W. ½ of E. ½ of N. E. ¼ of N. E. ¼ of sec. 11;

N. E. ¼ of N. E. ¼ of sec. 17;

E. ½ of lot 1 of N. W. ¼ and S. W. ¼ of sec. 19;

Sec. 29, and

Lots 1 and 2 of S. W. ¼ of sec. 31;

All in t'p 4 N., R. 9. E.

The bill was filed February 3, 1885, to set aside a patent to the Western Pacific Railroad Company dated November 23, 1875, and it is stated by the circuit court that "*this and six other suits* are brought by the United States against the Central Pacific Railroad Company, as patentee, and its various grantees now holding title, to vacate *seven different patents*, embracing in the aggregate *many thousand acres of land*, as having been improperly issued by mistake. They are the same sought to be vacated in U. S. *vs.* C. P. R. R. Co. (8 Sawyer, p. 81), in which the bill was dismissed without deciding upon the merits," &c.

In the case referred to *five* patents are specified, dated

April 9, 1870; April 3, 1872; February 28, 1874; November 23, 1875, and June 6, 1879; and the quantity of land embraced therein is over fourteen thousand acres. To these we add that described in case No. 11, dated July 21, 1881. The date of the 7th patent does not appear to be stated in these records; nor is the quantity of land covered in all the cases stated.

The question, or the main question, arising for decision upon the records in Nos. 11 and 12, when standing alone and separate from No. 1027, was whether or not a defendant in an action at law in the nature of ejectment, has a right to give in evidence facts tending to impeach a land patent of the United States for illegality, under which the plaintiff is demanding possession.

This question has been determined affirmatively in a case—No. 34, James Doolan *vs.* W. B. Carr, decided in this court on the 21st November, 1887—and the counsel for the defense in the two cases, Nos. 11 and 12, therefore have no other recourse than to maintain the rights of their clients under the associated case, No. 1027, by maintaining the integrity of the patents issued to the railroad company.

The cases here, Nos. 11 and 12, it is the expectation of counsel for defendants in error, will be controlled by the issues in case No. 1027 rather than by the naked question of law raised by the writs of error.

We claim that the lands in controversy in cases Nos. 11 and 12 were not within the limits reserved by the Moquelamos claim, or, if within such limits, that the reservation of the lands was terminated before the railroad grant took effect, and in either case the patents to the railroad company are valid. Should this court find the patents to be valid, then the plaintiffs in error or their representatives could take nothing by reversing the judgments, and will have no interest in obtaining new trials; but, on the contrary, if the patents for the lands are void, the defendants in error will not further maintain the contests.

Reversals will not be ordered in said cases Nos. 11 and 12 without proper change in the parties on the record, for the defendants in error have both died since the records in the cases were filed in this court. McLaughlin died, testate, December 13th, 1883, and Wise, intestate, May 12th, 1884. (Record in No. 1027, page 1.)

In No. 1027 the petition seeks to set aside a patent regularly issued Nov. 23rd, 1875. (Record, pp. 53–124, 55–131.)

The allegation of the petition is that said patent issued without authority of law (Record, pp. 5, 18), and the defendants say (Record, p. 14) that they paid an adequate consideration and acquired their lands "without any knowledge or notice of the alleged defect or any defect in the said patent or in the proceedings had respecting its issue, or of any defect in the title which the patent purports to convey."

The schedules attached to their answers (pp. 15, 16) and the order of events sustain their statements, and there is no denial of them. They are purchasers without knowledge of illegality and at a time when, as we shall show, the proper agents of the United States were fully recognizing the validity of their titles.

Argument.

The cause or reason alleged in said bill why the patents are void is, that the lands described were within the limits of a private land claim called Moquelamos, and were, therefore, reserved at the time the grant to the railroad company by acts of Congress of July 1st, 1862, and July 2nd, 1864, and July 3rd, 1865, took effect by a definite location of the line of railroad opposite them. This the defendants deny.

They contend—

I.

First. That the private claim had been rejected, and that the land was public land at the time of the definite location of the railroad.

II.

Second. That lands east of the dividing line of ranges 7 and 8 east were never within any reservation made by or for the Moquelamos claim, and it is not shown that they are within any proper limits to the claim.

The first of these propositions it so conclusively established in the opinion of the United States circuit court in this case, No. 1027, that it is deemed unnecessary to discuss it in this brief. Reference is made to the record, page 20 to page 31, inclusive.

Nothing therein could be strengthened and little of importance to the case could be added.

But, in consideration of the magnitude of the interests involved as well as to aid this court in dealing with the voluminous record in this case, we respectfully submit our argument upon the second proposition to show that it does not appear that the lands eastward of range 7 were ever reserved, in law or fact, for the Moquelamos claim.

The undersigned proposes to deal principally with the facts of record in discussing this matter.

What was this claim? Can it be said to have had four boundaries? Is not one of the limits so untrue or uncertain that it may be disregarded? Can such boundary now be ascertained, or has it by the evidence in this case been ascertained, with any more certainty than it had been in 1870, before the railroad patents issued? These are some of the intermingled questions.

It is plain that *the affirmative of the contest on this point is with the United States. It must be shown by the complainant with reasonable certainty that the demanded lands are within the claim.*

And here we note that MOQUELAMOS WAS A CLAIM, AND A CLAIM ONLY—and a very poor one at that. It was *not a grant.* The bill refers us to U. S. *vs.* Pico, 22nd Howard's Rep., 206, and to Pico *vs.* The U. S., 2nd Wallace's Rep., 279, for information.

It appears from the records and decisions in these cases that—

1. There was never a map or desiño of the alleged grant.

2. There was never juridical possession given.

3. There was never a survey of the claim by Mexican authority.

4. The grantee never entered into possession of the land under Mexico.

5. The existence of such a claim was not known to the neighbors until long after the change of flags.

6. A part of the expediente was forged. (See 2d Wallace's Rep., p. 282.)

See testimony of R. C. Hopkins (Record, 250) in answer to question 50:

"My opinion is that this grant was antedated—made after Pico's return from Mexico."

Record, 255, question 83.

His important testimony will be examined in the record and need not be reprinted here.

Mr. Hopkins says he has examined the archives in the office of the United States surveyor general for papers pertaining to Moquelamos. He—

Did not find a petition by Andreas Pico for the grant;
Did not find a desiño;
Did not find a reference;
Did not find an informé;
Did not find the marginal decree;
Did not find the grant in Jimeno's index.

Record, pp. 255, 256.

The claim, not being a Mexican grant, had its inception in the petition to the board of United States land commissioners, which was filed September 22, 1852.

Ex. K K K, Record, 658.

"Your petitioner, Andreas Pico, a native of Mexico and a citizen of Los Angeles, in California, respectfully represents that in the month of May, 1846, your petitioner presented his petition to Pio Pico, Governor of California, * * * for a grant of eleven leagues of land, constituting the tract known as 'Moquelamos,' * * * &c. The said land is bounded on the north by the southern shore of the Moquelamos river, on the east by the Sierra or range of mountains called ——, and on the south by the lands of Mr. Gulnac, and on the west by the estuaries of the beach."

With the petition, a copy of the alleged grant was filed; also a translation of the same. These are found in the Record, pp. 442 and 444.

In the translation we find the tract thus described: "The grant known by the name of 'Moquelamos,' to the *extent* "*of eleven square leagues.*"

The grant declares Pico "to be the owner in fee of eleven "square leagues" (once sitios de ganada major) "on the "Moquelamos river, bordering on the north upon the southern shore of said river, on the east upon the adjacent ridge "of mountains ('con la Sierra immediata'), on the south "upon the land of Mr. Gulnac, and on the west by the estuaries of the shore."

Mr. Hopkins says the words "Sierra immediata" strictly mean "contiguous range of mountains" (p. 254); that all the land elevated above the plain is included in the meaning of the words; that the words "Sierra immediata," when called for as a boundary, exclude the Sierras themselves.

Mr. Hopkins believes the proper method of locating Moquelamos would be from the beach to Moquelamos river and the lands of Gulnac (p. 254). He regards the desiño of Gulnac's land as well executed, with a length of about 3½

leagues to each side. The grant to Gulnac was of eleven leagues; three and a half leagues each way would give the eleven leagues.

This being mathematically true, it follows that 3½ leagues each way would give the quantity of Moquelamos.

The Gulnac grant was patented March 18, 1861 (Record, 257). Its shape is shown on its desiño, Respondent's Exhibit No. 22; also on the diagram received at the General Land Office December 16, 1870, Exhibit No. 28, "supposed Moquelamos grant," &c.; volume of maps not printed. (See also diagram annexed to a few of these briefs.)

When the United States district court confirmed the claim April 24, 1857, it was done in the same words that are used in the translation of the grant which is on file with the papers (Record, 446). Mr. *A. H. Cummins* translates the Spanish words used in describing the lands of the grant thus: "On the north by the southern bank of said river, "on the east by the Sierra adjacent, on the south by the "land of Senor Gulnac, and on the west by the marshes of the "shore" (Record, 169). He says "immediata" means, among other things, "near, close by, contiguous." Primarily it means "contiguous;" secondarily, "near" (p. 170).

Question 62. He says: "Sierra is a generic term in the "Spanish language applied to long continuous ranges of "mountains of a well-defined character, whose peaks yield "to the sight the metaphor of a saw."

Without discussing the testimony in this case, after reading it, any one will know there is nothing in nature which answers this description in that part of California but the Sierra Navada range, the crest of which is over 60 miles eastward from the railroad line through the Moquelamos claim.

After reading the testimony we are left where the claimant and his attorneys were when they filed their petition to the board. We cannot mention a sierra that is near Moquelamos and it will be noticed that the petitioner bounds

the land by "the Sierra or a range of mountains called ——" (blank)—that is, unknown to them; possibly not known to anybody.

But, to come down to practical sense and sound law, the fourth outboundary of Moquelamos being unfounded and indefinite and the other three boundaries definite and certain, the land is bound by them without resort to the fourth boundary.

Secretary Schurz found three of the boundaries to be distinct and well defined, the fourth indefinite.

In confirming the survey of a claim for land in California having three boundaries well defined and one not clearly determined, the United States Supreme Court, in the Fossat case (20 Howard, p. 413; also 2 Wallace, 649) held that the quantity of the grant should be located against the three well-ascertained boundaries and enclosed by a fourth line on the north, uniting the eastern and western boundaries.

Had this principle been applied by Secretary Schurz to the Moquelamos claim for eleven leagues, it would have fixed the eastern limit of the land FURTHER WEST than the surveyed range line adopted by the officers of the Land Department and represented on the diagram of 1870.

During a number of years, from 1852 to 1864, the General Land Office and the United States surveyor general's office at San Francisco took little notice of the Moquelamos claim.

In 1852 an act of Congress, approved August 31, entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending June 30, 1853, and for other purposes," was passed, which contained the following provision:

For surveying private claims in California which may have been presented in good faith to the board of land commissioners, $22,500: *Provided*, That the authority hereby conferred upon the surveyor general shall apply only to such unconfirmed cases as in the gradual extension of the lines of the public surveys he shall find within the immediate

sphere of his operations and which he is satisfied ought to be respected and actually surveyed in advance of confirmation.

November 28, 1855, instructions to the surveyor general of California, relating to the survey of private land claims in that State, were issued from the General Land Office (Record, 687) from which the following is quoted:

JOHN C. HAYS, Esq.,
Surveyor General of California.

SIR: In reference to certain questions and difficulties respecting the survey of private land claims in California the following is presented for your information and government:

* * * * * * *

4th. When the record and decree of final confirmation fix the area claimed, * * * and the figurative plan or map delineative of the limits gives a surface much larger than the area confirmed, the location is to be taken within that surface in a compact form, according to the lines of the public surveys, at the election of the confirmee, &c. * * *

5th. In any case of this class the surveyor general should make a formal demand upon the confirmee to give in writing a specific designation of the locality he may elect, within the extended limits indicated by the plat in the record, and a period should be fixed within which he should be required to make his election. In default of compliance it will be the duty of the surveyor general to exercise his sound judgment in fixing the location.

* * * * * * *

8th. If, however, in the gradual progress of the public surveys, the surveyor general approaches the location of a claim not finally confirmed, but which has been acted upon by either the board of land commissioners or the United States district court and is still pending on appeal, it will be his duty, when the exterior lines of said claim are clearly defined, to close the lines of the public surveys on or near the exteriors by legal subdivisions at such points, either within or without the lines of such claim, as will most nearly approximate its alleged boundaries; but where the boundaries are not clearly defined a similar course of proceeding should be taken, as indicated under the 5th head in the foregoing. * * *

In 1852 and 1853 township lines were run by the United States surveyor general within the boundaries of the Moquelamos grant. In 1855 and 1858 section lines of townships outside were run and plats of the surveys filed in the proper offices.

The above-quoted law and instructions were thus substantially carried into effect.

The survey of township lines in this region, viz., townships 1, 2, 3, 4, and 5 north, of ranges 5, 6, 7, and 8 east, was made as far as then necessary and practicable, in 1853, by Ralph W. Norris, under a contract with Samuel D. King, United States surveyor general, dated June 10, 1853. (Record, pp. 692, 694.) Norris completed his work and returned his field-notes Sept. 29th, 1853. (Record, 724.)

The townships westward of range 8 were not subdivided and offered at public sale, but those further to the eastward were. (Record, pp. 185 and 186.)

T'p 3 N., 8 E.—The plat of this was filed at San Francisco in 1855 and at Stockton in 1858.

T'p 4 N., 8 E.—Filed at Stockton, 1858.

T'p 2 N., 9 E.— " "

T'p 3 N., 9 E.— " "

T'p 4 N., 9 E.— " "

Some of these townships were but partly surveyed, but the surveyed lands were offered at public sale at Stockton in January and February, 1859, under the proclamation of the President for that purpose.

There were no lands within the Moquelamos diagram that were offered for sale under that proclamation.

In 1864 Stanly and Hayes were attorneys-at-law, practicing in California, as is abundantly shown by the testimony of John S. Stanley and R. C. Hopkins.

They were at that time attorneys for Andreas Pico in prosecuting his petition for confirmation of his land claim.

Possibly, in view of the liberal provisions in the act of Congress of July 1, 1864, it was anticipated that a railroad

across the continent would pass through or near the Moquelamos, and it was deemed important that no sales, selections, and adverse settlements should be made of the lands that might be confirmed, and these attorneys of Andreas Pico sought to suspend all proceedings for pre-empting the lands.

It is a fact, though not noticed in the record here, that townships 2 N., R. 7 E., and 4 N., R. 5 E., were subdivided in April, 1864, and therefore these attorneys may have become apprehensive of the possible initiation and filing of pre-emption and homestead claims on the land.

Therefore, on the 21st (22d) September, 1864, they filed in the United States surveyor general's office at San Francisco the following letter:

"To L. Upson, Esq.,

"*Surveyor General of the United States for the State of California.*

"Sir: You will please take notice that the land hereinafter described, and which is located in the State of California, is claimed under a grant from the Mexican Government made to Andreas Pico by Pio Pico, then Governor of Upper California, in the month of May, 1844, and confirmed to said Andreas Pico in 1846, and that said land is claimed under said grant, and the said claim has been appealed to the Supreme Court of the United States in a certain proceeding entitled Andreas Pico *vs.* The United States, and is now pending therein and is undetermined.

"That said land lies on the Moquelamos river, in what is now the county of Calaveras, and includes and covers the land embraced in township (2) two north, ranges five, six, and seven east, Mount Diablo meridian; also township (3) three north, ranges five, six, and seven east, Mount Diablo meridian; also township (4) four north, range six east, Mount Diablo meridian, part of township south of Moquelumne river; also township (4) four north, range seven east, Mount Diablo meridian, part of township south of Moquelumne river; also township (4) four north, range five east, Mount Diablo meridian, part of township south of Moquelumne river.

"And you will please further take notice that said land is

not subject to entry or pre-emption, and you are hereby requested to suspend all proceedings to pre-empt said land, or any part thereof, until the final determination of said claim. Said claim is known in the district court of the United States for the northern district of the State of California as case number one hundred and eighty-four (184), and to which reference is hereby made for a more particular description and information in regard thereto.

"Dated San Francisco, September 22, 1864.

"STANLY & HAYES,
"*Att'ys for Claimants.*"

Thereupon the surveyor general addressed the following letter to the register of the United States land office at Stockton (Record, p. 675):

"U. S. SURVEYOR GENERAL'S OFFICE,
"SAN FRANCISCO, *Sept.* 21*st*, 1864.

"SIR: You are hereby notified that the below-mentioned townships and parts of townships included in your register of homestead entries and land sold during the month of August, 1864, are suspended, to await the final determination of the boundaries of the Rancho 'Moquelamo,' now pending before the Supreme Court:

"T. 2 N., R's 5, 6, and 7 E.
"T. 3 N., R's 5, 6, and 7 E.
"T. 4 N., R. 6 E., (part south of river).
"T. 4 N., R. 7 E., " " "
"T. 4 N., R. 5 E., " " "
"All of Mount Diablo meridian.

"Very respectfully, your obedient servant,
"L. UPSON,
"*U. S. Sur. Gen'l.*

"S. T. NYE, Esq.,
"*U. S. Register, Stockton.*"

For these papers see Record, pp. 675–676, Resp. Ex. No. 9.

It is obvious that Stanly & Hayes obtained their schedule of lands from consulting the surveys of township lines in the surveyor general's office, and it is probable that they

consulted that officer as to the form and substance of such a letter as would secure from him the desired order to the register at Stockton.

This order has an indorsement, as appears at record 685, showing that it was received at the Stockton land office "September 24th, 1864." (See also testimony of Geo. A. McKenzie, pages 187, 541, and 542.)

The dates of the foregoing letters are not identical, but the last mentioned is evidently founded on the other, though dated one day earlier. The first mentioned has indorsed on it: "L. C., 357. Suspended September 25, 1864. Moquelamo 11 sq. leagues in Calaveras Co;" the other was received at Stockton September 24th and carried into effect September 25th, showing that the surveyor general's order might have emanated upon the 21st or the 22d.

The townships and parts of townships thus suspended are shown on the map, Respondent's Exhibit No. 28, volume of maps unprinted. This suspension was the only formal one now found, but the lands within the townships named were not surveyed in 1855 and 1856 and offered at public sale in 1859, as were some of those lying further east, and which, in this case, the United States attempts to show were within the Moquelamos reservation.

We find no explanation in the record of this state of affairs.

There may have been a few entries or locations allowed within the diagram prior to February 13, 1865, the date of final rejection of the Moquelamos, but, if so, no patents were issued thereon until afterwards. The exhibits of complainant, No. R R R and S S S, on pages 668 and 669 of the record, *are misleading and prove nothing*, because they do not describe the lands located by legal subdivisions, but quantity only. It will be found that some of the townships named are partly and others almost entirely *outside* of the lines of the suspension of 25th September, 1864, as shown on diagram, respondent's map, Exhibit No. 28.

Township 4 north, range 7 east, in which 1,400 acres is reported in Exhibit "R R R," is almost entirely *north* of the Moquelumne (or Moquelamos) river.

So, also, township 4 north, range 6 east, and 4 north, 7 east, have areas north of the Moquelumne (or Moquelamos) river of 25,000 to 30,000 acres, upon which locations to the amount of 6,320 acres of internal improvement and school lands were probably made, as stated in Complainant's Exhibit "S S S." (See Respondent's Exhibits 38, 39, and 40, Record, 724 and 725, which support the suggestion I here make.)

AFTER COMPLETION OF THE RAILROAD.

Next in the order of official transactions is the completion of the Western Pacific railroad opposite this locality, and the selection of land by said company under its grant. The railroad had been fully constructed opposite the lands, and the report of the commissioners, with a map showing completion of the road to the eighty-third mile south of Sacramento, was filed Oct. 26th, 1869 (Complainant's Exhibit O O O, Record 663), and accepted by the President of the United States not later than the 21st Jan., 1870 (Record, p. 53). The line of definite location and construction (Respondent's Exhibit No. 17) having been approved by Secretary Cox Feb. 1st, 1870 (Record, pp. 683, 684), and the suspension of patents then relieved, the way was open for patenting the railroad lands, and lists of selections were pending in the General Land Office. The Commissioner of the General Land Office, July 20th, 1870, addressed a letter (Respondent's Exhibit No. 29, Record, pp. 689, 690), from which the following is an extract:

2. As by the recent decisions of the Secretary of the Interior affirming the judgment of this office, the lands embraced in the suspension pending the rejection of the Moquelamos Ranch claim of Andrew Pico do not inure to the benefit of the railroad company, it becomes important to adjust

at once the definite lines of segregation confining this claim.

For this purpose you will call upon the surveyor general for such data as may not be of record in your office, and prepare a complete diagram showing the exact boundaries of the suspension as it actually existed, giving the sections and parts of sections, by legal subdivisions, actually withheld from disposal on account of said claim.

You will also furnish us with a complete list of all the correspondence on file in your office, with copies of the same, relating to this suspension, and report all notations shown by your records respecting the same.

Refer in reply to this by date as "G."

Very respectfully, Jos. S. WILSON,
Commissioner.

A true copy. S. C. H., *Ex'r.*

(Endorsed:) Respondent's Exhibit 29. S. C. H., examiner. Filed Aug. 24, 1886. L. S. B. Sawyer, clerk.

The diagram furnished in reply to this, (Respondent's Exhibit No. 28), is marked as received at the General Land Office with a letter of Dec. 16, 1870, which we fail to encounter in the printed record, but the map is so indorsed as to identify it as having been forwarded to the General Land Office in reply to this call. It is the diagram Respondent's Exhibit No. 28, approximatively the same as one attached to a few of the copies of this brief.

It will be noticed that Mr. Wilson emphasizes the suspension as it "actually existed," properly giving great weight to the lines of reservation existing since 1853 or 1854.

Before December 16, 1870—on April 9, 1870—a patent had issued to said company for *some tracts which fell within this diagram*, and shortly after December 16, 1870, viz., January 13, 1871 (Respondent's Exhibit No. 31, Record, p. 691), a demand was made for the surrender of title to them.

However, the patenting of the pending selections *outside of the diagram* deliberately progressed and patents, April 3d, 1872, February 28th, 1874, and 23d of November, 1875, and June 6th, 1879, were issued.

But as to lands *within* the diagram the United States made a distinction and demanded the surrender of title. The letter dated January 31, 1878, (Record, pp. 667, 668), specifies tracts amounting to 6,175 acres, lying in townships 2, 3, and 4 north, ranges 5, 6, and 7 east. The letter of the Commissioner of the General Land Office (Complainant's Exhibit Q Q Q) is as follows:

JANUARY 31, 1878.

HENRY BEARD, Esq.,
Attorney Western Pacific Railroad Company,
Washington, D. C.

SIR: On 9th April, 1870, patent No. 4, issued to the Western Pacific Railroad Company, embracing, among other lands, the tracts enumerated in the accompanying list.

The lands set forth in that list are located within the limits of the "Moquelamos" grant claim, which was rejected by the United States Supreme Court February 11, 1865, and were, by direction of the surveyor general of California, in a letter to the register of the United States land office at Stockton, California, September 21, 1864, specifically reserved from disposition until the final determination of the boundaries of that claim.

The issue of patent, therefore, to your company was an error soon discovered, and, upon its discovery, a list embracing part of the lands was prepared, which was transmitted you January 13, 1871, with statement of facts and request for relinquishment.

Beyond acknowledgment of receipt of the communication no attention has been paid by your company to that request, and the Supreme Court of the United States having decided, in the case of Newhall *vs.* Sanger, that the claim of the company to lands within the exterior limits of the "Moquelamos" grant claim is invalid, I now, under direction of the honorable Secretary of the Interior, make formal demand of the Western Pacific Railroad Company, its successors and assigns, for a reconveyance to the United States of the lands enumerated in the accompanying list, in quantity $6{,}175\frac{33}{100}$ acres, which were, for the reasons above given, erroneously patented to the company.

Respectfully,

J. A. WILLIAMSON,
Commissioner.

The list referred to is printed on page 668 of the Record. The letter of 13th January, 1871, is also printed at page 691, but the list of 1871 therewith is not printed.

That list (of which we have a certified copy) embraces all the tracts in the list at page 668, which lie in townships 2 and 3, in ranges 6 and 7 east—4,446.26 acres—as we make it by computation, but does not contain the others.

The caption to the schedule of 1871 is as follows:

List of tracts patented April 9, 1870, to Western Pacific Railway Company of California under acts of July 1, 1862, and July 2, 1864, subsequently ascertained to fall within the *surveyed boundary* of "Moquelamos grant, STOCKTON district."

The Commissioner in 1878 (Complainant's Exhibit Q Q Q) mentions an acknowledgment of the receipt of the communication of January 13, 1871. The reply of the attorney was something more. It appears to have been furnished to the Senate Committee on Public Lands from the General Land Office, and is found in Report No. 981, Forty-eighth Congress, second session, at page 26, and is as follows:

WASHINGTON, D. C., *January* 20, 1871.

SIR: I have to acknowledge the receipt of your letter of the 13th instant, inclosing schedules of lands in the Stockton and San Francisco land districts which you state have been patented to the Western Pacific Railroad Company, and of which you now request a relinquishment of title by the company to the United States.

A copy of your letter and list has to-day been forwarded to the land agent of the company at San Francisco, but I have myself no record of the lands patented, and no power to act in the premises, but would respectfully remark that at the time the patents were applied for by and issued to the company I had no knowledge of any undetermined adverse claim to any of the lands included in the patents.

Indeed, I apprehend that eventually it will be ascertained

that the tracts mentioned were properly included in the patents.

Very respectfully, your obedient servant,

HENRY BEARD,
Attorney.

Hon. JOS. S. WILSON,
Commissioner of the General Land Office.

(Copy of this report filed with the clerk for reference.)

This shows that the attorney of the company "a primordio," disavowed any knowledge of any "undetermined adverse claim to any of the lands included in the patents," and expressed the opinion that "it will be ascertained "eventually that the tracts mentioned were properly in- "cluded in the patents."

We are aware that these citations have not the force of record evidence, but we cite them as argument and in vindication of the truth of history.

It appears in the Congressional report (981) of Senate committee (page 28) that a reply was made to the letter of the Commissioner of the General Land Office of January 31, 1878, as follows:

WASHINGTON, D. C., *February* 6, 1878.

SIR: I have the honor to acknowledge the receipt of your letter of the 31st ultimo, in which it is stated that the inclusion of lands described in the schedule annexed to your letter in the patent of April 9, 1870, to the Western Pacific Railroad Company of California was erroneous, and a formal demand is made upon the company through me, as its attorney, for a reconveyance of said lands (6,175.33 acres) to the United States.

Your letter will be transmitted to the officers of the company at San Francisco, with the request that their answer be communicated to you.

So far as I am at present advised, the company does not concede that there was any error in the award of these lands, and the issuing of the patent to the company in 1870, by the direct action and orders of the President of the United States; and as the lands have long since been sold and con-

veyed by the company, it would be impossible for it to reconvey the title to the United States now, and improper for it to do any act to impair the standing of a title once deliberately approved by your office and the Secretary of the Interior, and now held by others.

Very respectfully,

HENRY BEARD,
Attorney for Central Pacific Railroad Company, Successor, &c., of Western Pacific Railroad Company.

Hon. J. A. WILLIAMSON,
Commissioner General Land Office.

There is not a tract of land involved in any one of the three cases now on trial which is found in this list of January 31, 1878, and all the demanded tracts are in the townships suspended September 25, 1864, at the Stockton land office.

It is thus shown that from January 13, 1871, to January 31, 1878, the General Land Office regarded the suspension of September, 1864, as truly designating townships and parts of townships covered by the Moquelamos claim. By the continued patenting of the lands in the townships further east it is shown that they were found not to be within said claim.

The complainant has spread upon the record a patent, but none of the lands sued for are included in it; neither are the lands of cases 11 and 12 found in it (p. 430, *et seq.*). The lands in the patent lie south of the base line along the first 20 miles of road north of San José, and are distant from 50 to 75 miles from the tracts sued for.

The complainant has also laid before us six lists of land selections by the railroad company at San Francisco (Record, pp. 373 to 396), and a seventh (p. 423), but none of the lands thereon are opposite the portion of road passing under the Moquelamos grant.

At page 405 and to page 409 we find a list of selections at the Sacramento office, September 23, 1869, which contains

the tracts in section 33, township 4 north, range 9 east, involved in case No. 12.

The caption of this list, page 406, is of some value, as indicating that township 4 north, in ranges 6, 7, 8, and 9 east, in whole or part, lie opposite to a section of the railroad "commencing at the city of Sacramento and ending at the fortieth mile of said railroad."

At page 411 of the record we have a Stockton list (duplicated at page 417), opposite the road from the thirty-fourth to the sixty-fourth mile from the city of Sacramento—67,956.57 acres. None of the land in case 1027 is in the list, but some of the land of case 12 is found in part of section 5 and all of section 9, in township 3 north, range 9 east.

The land in case No. 11 is not found on any exhibit in the case.

From the facts developed it is plain that the patents issued to the railroad company after January 13, 1871, were carefully and advisedly issued, after it was satisfactorily ascertained that they were for lands *outside* of the Moquelamos claim. But it is also true that the Land Department held at the time of issuing the patent, in November, 1875, and up to the announcement of the decision of this court in Newhall *vs.* Sanger (92 U.S., 731), in the spring of 1876, that land, falling under a rejected and false claim, passed to the grantee under a railroad grant.

It had so been decided by the circuit court in California in Sanger *vs.* Sargent, September, 1874, Pacific Law Reporter, vol. 8, No. 12, also in Newhall *vs.* Sanger, and by the State supreme court in case of Central Pacific Railroad Company *vs.* Yolland, March 15, 1875 (43 California, 439); and on 14th May, 1875, Secretary of the Interior Delano, referring to those decisions, followed them in a very able opinion in the case of H. E. Dillingham *et al.* (Coppo Land Owner, vol. 2, p. 37). This view he reiterated July 15, 1875 (same volume, p. 84).

We understand that it was settled by this court early in

1876 in Newhall *vs.* Sanger (92 U. S. Rep., 761) that the odd-numbered sections of land within the limits of the grant to the Central Pacific Railroad Company which, at the time the line of the road was definitely fixed, were found within the limits of an invalid private claim then *sub judice*, were excepted from the grant.

But the date at which the railroad was definitely fixed through the indefinite Moquelamos claim has not been determined judicially, nor has it been determined where the true boundaries of that claim are found.

SOMETHING UNUSUAL.

We now come to some features in this case that are certainly unusual. We are confronted by the apparition of a peripatetic boundary to land. The eastern boundary of Moquelamos begins its travels toward the rising sun.

In the case of Clayton Beck and others, involving tracts in townships 3 and 4 N., R. 9 E., Stockton land district, in which the parties applied to file pre-emption declaratory statements upon tracts which had been patented to the railroad company, the Commissioner decided, January 28, 1878, that as the lands were not included in the area suspended under the surveyor general's order of 21st September, 1864, they were properly patented. Secretary Schurz, however, on 30th January, 1879 (Copp's Land Owner, Vol. 6, pp. 5 and 6), decided that the townships and parts of townships suspended in 1864 "did not represent all "the land within the landmarks mentioned in the conces-"sion" of Moquelamos rancho. He held that the northern, southern, and western boundaries were well represented on the "plat transmitted to your office by the register of the "local land office at Stockton on December 16th, 1870."

He said the call for the eastern boundary was the adjacent ridge of mountains, which he did not think was satisfied on the township line between ranges 7 and 8 east. He believed

that the "nearest range of mountains could be found a few "miles further eastward," and concluded by saying:

"Inasmuch as the duty of instituting proceedings to set aside the patents improperly issued to the company will devolve upon the United States, and as the proofs necessary to sustain an action cannot be made without a satisfactory identification of the boundaries of this grant by actual survey, you are directed to cause a survey and plat of the grant to be made by the surveyor general of California without unnecessary delay."

Thereupon the Commissioner of the General Land Office wrote to the U. S. surveyor general the letter of February 18th, 1869. (Complainant's Exhibit Z, Record, 447.)

The honorable Secretary having proposed to remove the eastern line of reservation farther east, the Commissioner saw the necessity at once of bringing the southern and eastern boundaries to a junction so as to enclose the land by its boundaries. He then directed an extension of the southern boundary eastward, saying:

"With regard to the southern boundary, which is the Rancho Campo de los Franceces, *in part (!) you will consider the Calaveras river as constituting the remainder of said boundary* to a point opposite the adjacent mountains on the east," &c.

Here we have *multum in parvo*. Here is the egg from which this suit is hatched. To lay a foundation for the suit it was needed to find a new place for the eastern boundary and to manufacture an extension of the southern boundary. This is the scheme for transplanting the eastern line of the claim.

In accordance with this scheme a surveyor was sent into the field and made a survey and a plat, a copy of which we have upon Complainant's Exhibit "E E." This plat shows what is called the Bond survey, the line in townships 3 and 4 north, range 9 east, being quite crooked and failing to show that serrated ridge against the sky. The matter having been referred, with a report of 27th of September, to Secretary

Kirkwood he (October 20th, 1881) directed another survey to be made, saying (Complainant's Exhibit A A, Record, 448, 449):

"I direct that a disinterested and competent person be instructed to make a survey of the east line of the claimed limits of the alleged grant, *that being the only line in controversy*, at as early a day as practicable, in order that the same may be ready for production, if required, on the trial of the case for setting aside said patents, which it is understood is now pending in the United States circuit court for California.

"The papers transmitted with your letter of September 27 ult. are herewith.

"Very respectfully,

"S. G. KIRKWOOD,
"*Secretary.*"

Secretary Kirkwood's orders were executed by A. W. Von Smidt, and in February, 1882, he laid off a line "some-"what east of the survey made by Deputy Surveyor Bond "in 1879," a second transplanting of boundary. (See Complainant's Exhibit D D, Record, page 451.)

But this second removal still was not just the thing wanted. The land in case No. 11 was still outside this eastern boundary, and the proposition for *removal third, is to carry* this line "*twenty miles*" further east to "*the nearest mountains*" (Record, 450, 451, Compl't's Ex. C C; also Ex. "D D," p. 451.) In this last paper (the Commissioner to the Secretary, May 8th, 1882, at page 453) a new scheme of enlarging the limits is developed. The rule of the Department in such cases, stated in Exhibit C C to be that "when a Mexi-"can claim is bounded by a range of mountains the base of "the mountains is regarded as the boundary," is avoided by a change in the translation of the grant, and we are solemnly told—or the Secretary was told—that "in the present case the "claim was not bounded by *a range* of mountains, but by the "ridge, which has always been held to mean the *top* or *crest* "of the mountain and not the base." (P. 453, Ex. D D.)

The Commissioner therefore suggests the " crest or top of " a mountain " for the east line and renews his own line of the Calaveras river for a south boundary. The junction of these boundaries would bring us to the point where the river passes over the top of the mountain—and we wish to go there.

But the attempt to reduce this scheme to survey has not been made, and the Land Office is, in this matter, like the boy who amuses us by chasing the foot of the rainbow in the meadow. He is all the time chasing it, but never gets there.

But, to support the general forward movement of this traveling boundary, field-notes and plats of the regular surveys of the public lands are gravely presented in this record, but when examined they give no assistance.

Copies of townships, maps of t'ps 2, 3, and 4 of range 5 E.; Compl't's Exhibits C C C, D D D, E E E; t'ps 2, 3, and 4 of range 8 E., Ex. " W W, "Y Y," "A A A"; t'ps 3 and 4 N. of range 9 E; t'ps 3 and 4 N. of range 10 E.; t'ps 3 and 4 N. of range 11 E., all found in the unprinted volume of maps, when thoroughly overhauled give no assistance to the transporting or changing of the boundaries of the claim.

On the contrary, they show obstacles in nature to the scheme of finding a serrated ridge in any place that can be called " contiguous " or " near," running across between the rivers Moquelumne and Calaveras and opposite the western boundary for Moquelamos. On the larger maps of California the Moquelumne is shown coming to the westward from the mountains within two miles of the Calaveras, in township 5 north, ranges 12 and 13 east; but that much-talked-of Bear Mountain—how about that? The trouble is that this mountain lies *south of the Calaveras river*, in t'p 4 N., 11 E., as shown by the plat and field-notes. If the mountain is an eastern boundary the river is not a southern one.

Tp 3 *N.*, *R.* 10 *E.*

The field-notes in evidence indicate a rough and somewhat mountainous region along the Calaveras river. Four sections in the southwest corner of this township were subdivided in 1858 (Record, 502). At top of page 510 the surveyor says: "In this township I was able to run the lines of but four sections 29, 30, 31, and 32, being prevented from extending them further north and east on account of the mountainous nature of the country."

But on 31st August, 1870, additional surveys were commenced and extended over more than two-thirds of the townships (Record, 510 to 552). On almost every mile the surveyor crossed hills and ravines, neither of which seem to have any uniform trend.

He reported the northeastern part unsurveyable "on account of the precipitous character of the hills" and the northwestern part on account of "the denseness of the chemisal growth." (P. 522.)

But the subdivision was continued in January, 1879 (p. 524), the survey on "ridges" and "spurs" running in every direction. For instance, north between sections 14 and 15, at 11 chains "top of spur bears N. E. and S. W.;" at 19 chains "top of ridge bears E. and W.;" at 60 chains "top of ridge bears E. and W.;" at 79 chains "top of ridge bears N. W. and S. E."

These notes demonstrate two facts: The ridges are near together—three or four to the mile—and must be inconsiderable in size and elevation; second, the direction of them is as frequently east and west as north and south. So, on a course north between sections 7 and 8 (p. 527), we find three spurs or ridges within 15 chains, all on an eastern and western course.

T'p 4 *N.*, *R.* 10 *E.*

All this township was surveyed except the S. ½ of sec. 11 and the N. ½ of sec. 14.

At Record, page 537 (1627), the surveyor says: "It is impracticable to run a line between sections 11 and 14, as it would cross both Bear Mountain and Table Mountain."

Those two mountains are evidently not very large if both would be crossed in a distance of one mile. At the corner of sections $\frac{10}{15}$ and $\frac{11}{14}$ he reports surface "hilly and brushy, poor and gravelly soil."

Houses, barns, and fences are noted as found in this township.

At page 548 the surveyor says: "Bear Mountain and Table Mountain, in the eastern part, is a safe retreat for deer and other game, and useless for any purpose as yet devised, except as landscape."

The coming "summer resort!" That great game! Those lovely landscapes!

T'p 3 *N.*, *R.* 11 *E.*

The whole of this township appears to have been surveyed, partly in 1870 and partly in 1884. The field-notes of survey in the northern and northeastern part report the land as "mountainous" and timbered with oak and pine. (Record, pp. 550 to 558.)

At page 569 the surveyor says: "The main ridge of Bear Mountain range runs through the township in a northwesterly and southeasterly course." He had surveyed 16,191.91 acres, and represented the balance on his plat as unsurveyed mountains; but in 1884 surveys were continued and completed.

The surveyor of 1884 confuses us by his final report. He does not mention a range of mountains. In his field-notes he often reports "land mountainous."

In his final summing up (p. 578) he says the lands he has

surveyed are "*mostly* covered with dense thickets of chemisal. There are several settlers within the limits of the survey."

T'p 4 N., R. 11 E.

The Calaveras river is found running through this township from northeast to southwest, entering in section 12 and leaving in section 31.

Surveys were made partly in 1858, partly in 1870, and partly in 1883.

The surveyor of 1870 reports (p. 600): "This township contains considerable table and valley land, with much that is valueless." * * *

"In the southeast corner the NORTH end of Bear Mountain, a very rough and rocky ridge," &c.

The surveyor of 1883 (p. 604) says: "This land in sections 23, 24, 25, 26, 35, and 36 is mountainous in character, lying upon what is known as Bear Mountain range," &c.

These field-notes compared are not readily harmonized.

The Bear Mountain range, is that peripatetic? Is that on its travels?

In t'p 3 N., R. 10 east, no mountain range or ridge is reported, but tops of hills and spurs are reported.

The mountains are further east, as indicated by surveys of t'p 3 N., R. 11 E. The surveyor of 1870 says the range is through the township N. E. to S. W.

But the surveyor of 1884, who completed the work, speaks of "land mountains," but nothing of the Bear Mountain range through the township.

As to t'p 4 N., R. 10 E., there, the surveyor says, Bear Mountain and Table Mountain are both crossed by the line that would divide sections 11 and 14. He speaks again of these mountains as being in the eastern part of this township.

But in the official returns of t'p 4, R. 11 E., the surveyor

says the sections in the eastern part of *that* township "lie upon what is known as Bear Mountain range."

The most natural reconciliation of these reports is that there are mountains along in the eastern parts of both townships, and that the name "Bear Mountain" is not universally given to either of the ranges.

The surveyor in 1858, in running lines in the western part of t'p 4, R. 11 (pp. 580, 581, and 582), mentions several ascents—from 100 feet to 250 feet high—to the tops of ridges, and one ridge of 100 feet is noted "great local attraction."

All the lands in this region have been surveyed. The surveys demonstrate—what the trend of the streams would also indicate—a constant and gradual rise of the surface of the earth from the San Joaquin plains to the Sierra Nevadas.

How does this voluminous evidence produced by the United States now appear when applied for the purpose of finding an eastern limit for Moquelamos? The mountains in t'p 4 N., ranges 10 and 11 E., are *too far north* to lie opposite the west line of Moquelamos, and too far off.

Those in townships 3 north and 10 and 11 east are too far away to be "immediata," as relates to the configuration of the claim, or to close upon the diseño of Gulnac's land. They lie from northwest to southeast, and not at right angles with the course of the north boundary of Moquelamos, yet they are sixty miles west of the top of the Sierra Nevadas (Record, p. 85). Gulnac's diseno designates Pico's southeast corner to be identical with Gulnac's northeast corner, and this northeast corner is near the range lines, between ranges 7 and 8.

THE TESTIMONY OF WITNESSES.

The evidence in this case shows that in nature there is a line where the hills and rolling land begin on the east to rise from the San Joaquin plains. This is the line selected for the east boundary of Moquelamos by the claimant

while this claim was pending, and appears to have been recognized everywhere and by everybody as correct from 1852 to 1879. (See testimony of Ed. E. Tucker, pp. 194, 195, questions 20, 21, 22, and *seq.*)

From this line (range line between ranges 7 and 8 east) the country is hilly and rolling and gradually rising to the eastward. This first line of hills, part of it at the north end, is west of that range line (Record, pp. 82, 83, questions 7 to 21; see also testimony of Atherton, p. 220).

The San Joaquin and Nevada railroad commences at Brock's, on tidewater, and extends eastward 39½ miles to Spring Valley. In the first 20 miles to Lockford it rises 108 feet; in the next 19½ miles it rises to 670 feet from tidewater (testimony of Washburn, pp. 130, 131). This shows the general rise towards the mountains.

J. P. Brodie was an agent of Andreas Pico in managing the Moquelamos lands. He died in 1868 (Record, p. 257).

Jas. H. Cole is a farmer, and has lived on sec. 35, in t'p 3 N., R. 7 E., since 1850 (Record, 214). This witness knew Brodie in 1857 as an agent of Andreas Pico in selling the Moquelamos lands. Witness bought his land of Brodie. It was in sec. 2, in t'p 2 N., R. 7 E., and sec. 35, in t'p 3 N., R. 7. E. (p. 215); but Brodie declined to sell the W. ½ sec. 25, in t'p 3, R. 7, because "they had more land within the "limits of the boundary that they had already taken than "they had a right to sell; therefore they would not go to the "east of the line of their claim as staked off by the sur-"veyor" (p. 215, q. 18). * * *

"Brodie had a map of their survey at that time, and showed me a map of their grant, and the boundaries all staked off." * * * (p. 216). "That survey went only to the east line of the township, to what is called the Jack Tone road, a mile east of my land."

This witness knew the township line, and had his land surveyed before buying it (p. 217).

Power of attorney to Brodie recorded in county office. Copy Respondent's Exhibit No. 21. (Record, 685.)

Among the papers of Mr. Edward Stanley there was found by his son (Record, 271) a map, endorsed "Map of Moquelamos," given by Mr. Brodie to Mr. Stanley the 8th February, 1858. This map (Complainant's Exhibit No. 32) is bound up with the original papers of the case at page 2050, and not with the other maps, and not printed. It shows the Moquelamos claim located, for its quantity of eleven leagues, directly north of the Gulnac land and north of Stockton, west of the range line, between ranges 7 and 8 east, and not extending northward as far as the Moquelumne.

There is more than double the area of the eleven leagues between the Moquelumne, Gulnac's land, the range line named, and the marshes of the San Joaquin.

CONCLUDING REMARKS.

The testimony and exhibits of the complainant in case 1027 disclose an effort to extend the limits of the rejected claim, Moquelamos, to or beyond the extreme limits of the railroad grant upon the east, so as to take in the lands in t'p 3 N., R. 10 E., in controversy in case 11.

The complainant endeavors to show that the eastern limit of "Moquelamos" is, if anywhere, somewhere to the east of the railroad limits, in townships 3 and 4 N., of range 10 E., as shown on Complainant's Exhibit T T, in volume of maps not printed. See also Complainant's Exhibit E E, same volume.

The United States circuit court for the ninth circuit, in the case of The United States *vs.* The Central Pacific Railroad Company (8th Sawyer's Reports, p. 81), held that the act of the United States surveyor general in subdividing the public lands east of range 7 and closing those surveys on the line between ranges 7 and 8, made such a segregation of the unconfirmed Moquelamos claim as is provided for by the act

of Congress of 1852 and the Land-Office instructions of 1855.

The court said:

"In this case there was a claim for the unconfirmed Moquelamos grant pending before the board of land commissioners which, "*in the gradual extension of the lines of the public surveys*," the Surveyor General *seems to have found* "*within the immediate sphere of his operations, and which he was satisfied ought to be respected and actually surveyed in advance of confirmation.*" He accordingly surveyed it, leaving an ample quantity of by far the best and most valuable portions of the land west of the range line mentioned, to more than satisfy the grant, sectionizing and platting the surplus—being that part situate to the east of said range line—as "public land," subject to be treated as other public lands, and returning the surveys and plats to the proper land office. This proceeding seems to have been authorized by the provision of the statute cited, and to have emancipated that portion of the land lying to the east of the range line, between ranges 7 and 8, from any further claim under the Moquelamos grant. If that be the effect, then there can be no question that these lands at least were subject to and embraced in the Congressional grant to the Central Pacific Railroad Company.

The claimant of the grant himself, also, as we have seen, by his counsel, limited his claim to the lands so reserved for the purpose lying west of the said range line, so that all parties in interest acquiesced in limiting the eastern exterior boundary of the land out of which the grant was to be satisfied to the said range line. Certainly, if the doctrine of estoppel applies to any case as against the United States, it ought to be made applicable here, where all parties, including the claimant himself, for so many years acquiesced in accepting said range line as the eastern exterior boundary of the land within which the grant was to be located. Besides, as before suggested, there is no sufficient legal evidence as against the defendant that the eastern exterior boundary is, in fact, east of that line. But conceding this recent *ex parte* survey to be legal evidence, it surely is not entitled to greater weight than the strictly official survey of 1855, executed under the express authority of the statute of 1852 cited, by which the eastern boundary of the tract out of

which the grant was to be satisfied was located at the range line, between ranges 7 and 8, and which was ever afterwards, till after issue of these patents, acted upon by the Government, the claimant himself, and the people at large as properly located.

The manifest informalities in this brief and the inclusion of matters perhaps not necessary will be partly accounted for by the fact that the undersigned had not received a copy of any brief for complainant in case 1027 up to Saturday morning, the 3d December, 1887, when the preparation of this brief is concluded.

Respectfully submitted,

HENRY BEARD,

Attorney for Defendants in Error, Nos. 11 *and* 12.

127-415-7
127-457

FILED
APR 3 1884
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 1087.

GEORGE FRIEND, STEPHEN McGORRAY, THOMAS McGORRAY, C. H. NELSON, W. J. NELSON, *et al.*, PLAINTIFFS IN ERROR,

vs.

TULLY R. WISE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

HENRY BEARD,
CHAS. H. ARMES,
Attorneys for Defendant in Error.

JUDD & DETWEILER, Printers.

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vs.

TULLY R. WISE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Motion to Dismiss, with which is United a Motion to Affirm.

Now comes the defendant in error, by his attorneys, and moves the Court to dismiss the writ of error in this cause for want of jurisdiction, because it does not appear from the record that the value of the matter in dispute, exclusive of costs, exceeds five thousand dollars.

The said defendant, by his attorneys, further moves to affirm the judgment of the said circuit court, because the only questions arising on the record have been settled by numerous decisions of this court, and it is therefore obvious that the writ of error was sued out for delay.

HENRY BEARD,
CHAS. H. ARMES,
Attorneys for Defendant in Error.

To WILLIAM J. JOHNSTON, Esq.,
Attorney for the above-named Plaintiffs in Error:

Please take notice that the foregoing motions will be called up for submission to the Court on Monday, the 21st day of April, 1884, or as soon thereafter as the Court will entertain the same.

HENRY BEARD,
CHAS. H. ARMES,
Attorneys for Defendant in Error.

I hereby acknowledge service of a copy of the foregoing motions and notice, with copies of the argument thereon, of the attorneys for the defendant in error.

WASHINGTON, D. C., *March* 29, 1884.

W. J. JOHNSTON,
Attorney for Plaintiffs in Error.

Filed March 29, 1884.

The Case.

The record shows that Wise, the defendant in error, on the 25th day of May, 1882, filed a complaint in the court below, in the nature of an action of ejectment, alleging ownership and right of possession of the land in question, and that on the 17th of May, 1882, and while he was so the owner and entitled to possession, the defendants entered, ousted, and ejected him therefrom, and still withhold the possession thereof from him.

That the value of said land exceeds $500, and is worth $2,000; and that his title thereto arises under the Constitution and laws of the United States. (Rec., 2, 3.)

On the 1st day of July, 1882, the defendants, Friend, Stephen and Thomas McGorray, C. H. and W. J. Nelson, Doyle, Esmond, Henderson, Smith, Esmond, Scott, Wilson, and Lambert, demurred to the complaint, alleging five grounds therefor; which demurrer was, on the 7th of August, 1882, by the court sustained. (Rec., 3, 4.)

On the 24th day of November, 1882, said defendants filed an answer to said complaint, denying each and every allegation of the same. (Rec., 5.)

On the 27th day of November, 1882, by consent of the respective counsel in the case, said order sustaining said demurrer was by the court set aside and said demurrer was overruled. (Rec., 5.)

On the 16th of January, 1883, the cause having come on for trial, as to the plaintiffs in error, a verdict was rendered for the plaintiff, and damages were assessed against the plaintiffs in error in the sum of $100 each, (Rec., 6;) and thereupon judgment was rendered, reciting said verdict, &c., and concluding as follows:

"And the court having ordered that judgment be entered herein, in accordance with said verdict, and for costs:

"Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that Tully R. Wise, plaintiff, do have and recover of and from George Friend, Stephen McGorray, Thomas McGorray, C. H. Nelson, W. J. Nelson, John Doyle, Charles Esmond, Robert Henderson, W. J. Smith, Hezekiah Esmond, John Doe Scott, R. D. Wilson, and D. A. Lambert, defendants, the possession of sections Nos. five and nine, both in township No. three north, of range No. nine east, and sections twenty-seven, thirty-three, and thirty-five, all in township No. four north, of range No. nine east, of the Mount Diablo base and meridian, according to United States surveys, and situate in San Joaquin and Calaveras counties, State of California.

"And it is further considered by the court, that said plaintiff recover from each of defendants last aforesaid the sum of one hundred dollars damages, and from all defendants last aforesaid his costs in this behalf expended, taxed at ninety-nine $\frac{40}{100}$ dollars.

"Judgment entered January 16, 1883.

"L. S. B. SAWYER, *Clerk.*"

The bill of exceptions shows that at the trial the plaintiff offered in evidence a United States land patent issued in the year 1870, regular upon its face, (printed in the Record,) granting the land in question to the Western Pacific R. R.

Co. of California, and to its assigns; also certain mesne conveyances, through which he derived title under said patent, which were by the court admitted in evidence. (Rec. 8, 9, 10, and 11.)

The defendants, to establish that the form of said patent is not a patent in law or in fact, and that it was issued without authority of law, and is null and void, offered to prove that the lands in question had been included in a Mexican grant called "Moquelamos," made to one Pico in 1846; that the United States district court for the northern district of California had confirmed said grant, but on appeal to the United Statas Supreme Court, said grant was by said court, on the 13th of February, 1865, rejected.

That on January 30th, 1865, the line of said Western Pacific Railroad was definitely fixed opposite said lands, and that on the 31st of January, 1865, said lands were withdrawn from private entry, &c. (Rec., 11, 12.)

And—

"For the purpose of showing the right of defendants, and each of them, to take and keep possession of the respective portions of the lands described in the complaint herein, taken and kept by said defendants, they offered to prove that said Stephen McGorray is now * * * qualified to homestead a quarter section of public land. That on the 25th day of March, A. D. 1881, he made settlement in person on the N. E. ¼ of section 9, in t'w'p 3 N., R. 9 E., M. D. M., California, which contains 160 acres only, for the purpose and with the intention of acquiring title to the same under the laws of the United States. * * * That he has never had or claimed any homestead right to any of the public lands of the United States, except to said one quarter section of land so settled on by him. * * * That he has never been, and is not now, in possession of, and has never claimed any part of, the land described in the complaint, except said N. E. ¼ of section 9, in t'w'p 3 N., range 9 east, M. D. M., California. That within 30 days after he, the said defendant, settled on said ¼ section of land, he subscribed and made his homestead application for said ¼ section of land under the laws of the United States, and re-

quested the register of said United States land office at Stockton, California, to file the same in that office, and offered to pay the legal fee therefor, and said register refused, and still refuses, to file said application, on the sole ground that said form of patent of said land has been issued." (Rec., 12, 13.)

Said bill of exceptions also shows the following:

"In order to facilitate the trial and save time, it was agreed to by counsel for the plaintiff and defendants and consented to by the court, that the same offer of proof be held and considered as being made for each of the other defendants, and for and concerning the portion of the lands in controversy herein, held and claimed by them, respectively, as made for defendant McGorray, and for the portion of said land held and claimed by him, and that the same objection be held and considered made thereto by plaintiff, with the same ruling of the court and exceptions by the defendants and each of them." (Rec., 14.) * * * *

"It was stipulated and admitted in open court as evidence before the jury by the parties plaintiff and defendants, that the value of each quarter section of land in dispute in this action in the respective possession of each of the defendants is three thousand dollars, and the value of any two of said quarter sections is six thousand dollars." (Rec., 14.)

The defendants moved that this action be dismissed, on the ground that the court below had no jurisdiction thereof, which motion was denied by the court. (Rec., 14.)

The objections of the defendants to the evidence offered by the plaintiff and the objections of the plaintiff to the evidence offered by the defendants raised questions of law, all of which (that are worthy of mention) are contained in the following—

Instructions of the Court to the Jury.

"GENTLEMEN: There is really but one issue of fact upon which there is any conflict in the testimony in this case, and that is the value of the rents and profits of these pieces of land. The plaintiff has put in evidence the patent of the

United States, and claims title through that patent to himself. That shows the legal title in him; whether he has got it rightfully or not is not open for consideration in this case. If he has got it wrongfully, the remedy is elsewhere. There was a grant made to the Western Pacific Railroad Company of certain lands. There were certain officers appointed to ascertain whether these lands were in the grant or not. They have passed on that question and issued the patent. Their action is conclusive, so far as this case is concerned. The legal title, whether rightfully or wrongfully, is in the plaintiff in this case." * * * * *

"The defendants, and each of them," excepted to these instructions.

Argument on the Motion to Dismiss.

The foregoing shows that the defendant in error claims the land in question under a land patent of the United States. The plaintiffs in error deny the validity of the patent, and, to maintain their own claims, they offer to prove that each defendant holds one quarter section, or one hundred and sixty acres, of the land in question, as a homestead settler under the laws of the United States. This quantity of land is fixed by the law as the greatest quantity that may be taken for a homestead. The only matter in dispute between either of said plaintiffs in error and the defendant in error is, therefore, a single quarter section of land and $100 in money, the amount of damages assessed by the jury against each of them. There is no unity of interest between the plaintiffs in error in their several homestead claims, and there can be none under the law. There is no joint possession, either of the improvements upon the land or of the land itself. They had separate possession of different tracts, and the evidence of each of them is, "concerning the portion of the lands in controversy herein, held and claimed by them respectively"—the same evidence that Stephen McGorray offered concerning the quarter section admitted by him to be in his possession, to wit, that he, on

a certain day, settled in person on one quarter section of said land, which contains 160 acres and no more, for the purpose of acquiring it under the homestead laws of the United States; that he has never had or claimed any other lands of the United States than said quarter section, and "has never been, and is not now, in possession of, and has never claimed any part of the land described in the complaint except said" single quarter section, upon which he has settled as a homestead claimant, and for which he has made application as such homestead settler to the officers of the Land Department of the United States Government.

There is no evidence tending to show, and it is not claimed by either of the plaintiffs in error, that either of them is in possession of a greater quantity of the land than said McGorray. There was no formal offer of evidence on the part of either of them, excepting said McGorray; and the evidence as to each of them being the same, it was for convenience, and (as stated in the Record) *to facilitate the trial and save time*, agreed to by the parties, with consent of the court, that the evidence offered by McGorray should be taken as the evidence offered by each concerning the portion of the land held by each one respectively.

There was no evidence offered in the case to show the aggregate value of all the lands sued for. On the contrary, the evidence before the jury shows the value of each quarter section only so far as that one quarter section is in dispute between any one of the plaintiffs in error and the defendant in error. It is as follows:

"It was stipulated and admitted in open court as evidence before the jury, by the parties plaintiff and defendants, that the value of each quarter section of land in dispute in this action, in the respective possession of each of the defendants, is three thousand dollars, and the value of any two of said ¼ sections is six thousand dollars."

It therefore appears affirmatively from the Record that the value of the matter in dispute between any one of the

plaintiffs in error and the defendant in error, exclusive of costs, is, land, $3,000, and damages, $100; total, $3,100.

As to the form of the judgment, it will be observed that, in assessing damages, the jury did not assess the defendants jointly in the sum of $1,300, but assessed each defendant $100. Had the form of the judgment been otherwise, when upon *the whole Record* the judgment should have been against the defendants severally, the Court would probably hold that it was in substance and effect not a joint judgment, but several, according to the evident intention of the court below.

See Sparrow *vs.* Strong, 4 Wall., 594.

The value of the matter in dispute between any one of the plaintiffs in error and the defendant in error is not sufficient to maintain the jurisdiction of this Court, and their separate interests cannot be united or added together for that purpose. This has so often been decided by this Court that we do not think it necessary to refer to the decisions.

We respectfully submit, therefore, that the motion to dismiss should be granted.

On the motion to Affirm.

It is respectfully urged that, should the Court hold that it has jurisdiction of this case, the judgment of the court below should be affirmed.

There is, in this case, an attempt on the part of the defendants in an action at law, in the nature of ejectment, to impeach a United States land patent under which the plaintiff derives title. That this cannot be done has been decided so often by this Court, that we do not believe the Court desires to hear further discussion of the proposition.

See Steel *vs.* Smelting Co., 106 U. S., 450.
Smelting Co. *vs.* Kemp, 104 U. S., 636.
United States *vs.* Schurz, 102 U. S., 378.

French *vs.* Fyan, 93 U. S., 169.
Meader *vs.* Norton, 11 Wall., 442.
Gibson *vs.* Chouteau, 13 Wall., 92.
Johnson *vs.* Towsley, 13 Wall., 72.

This is the only question presented by the Record to which we deem it necessary to invite the attention of the Court.

Respectfully submitted.

HENRY BEARD,
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Attorneys for Defendant in Error.

127-457

Supreme Court

OF THE

UNITED STATES.

October Term, 1883. No. 1087.

George Friend, Stephen McGorray, Thomas McGorray, C. H. Nelson, W. J. Nelson et al,

Plaintiffs in Error,

v.

Tully R. Wise,

Defendant in Error.

REPLY TO MOTION TO DISMISS, Etc.

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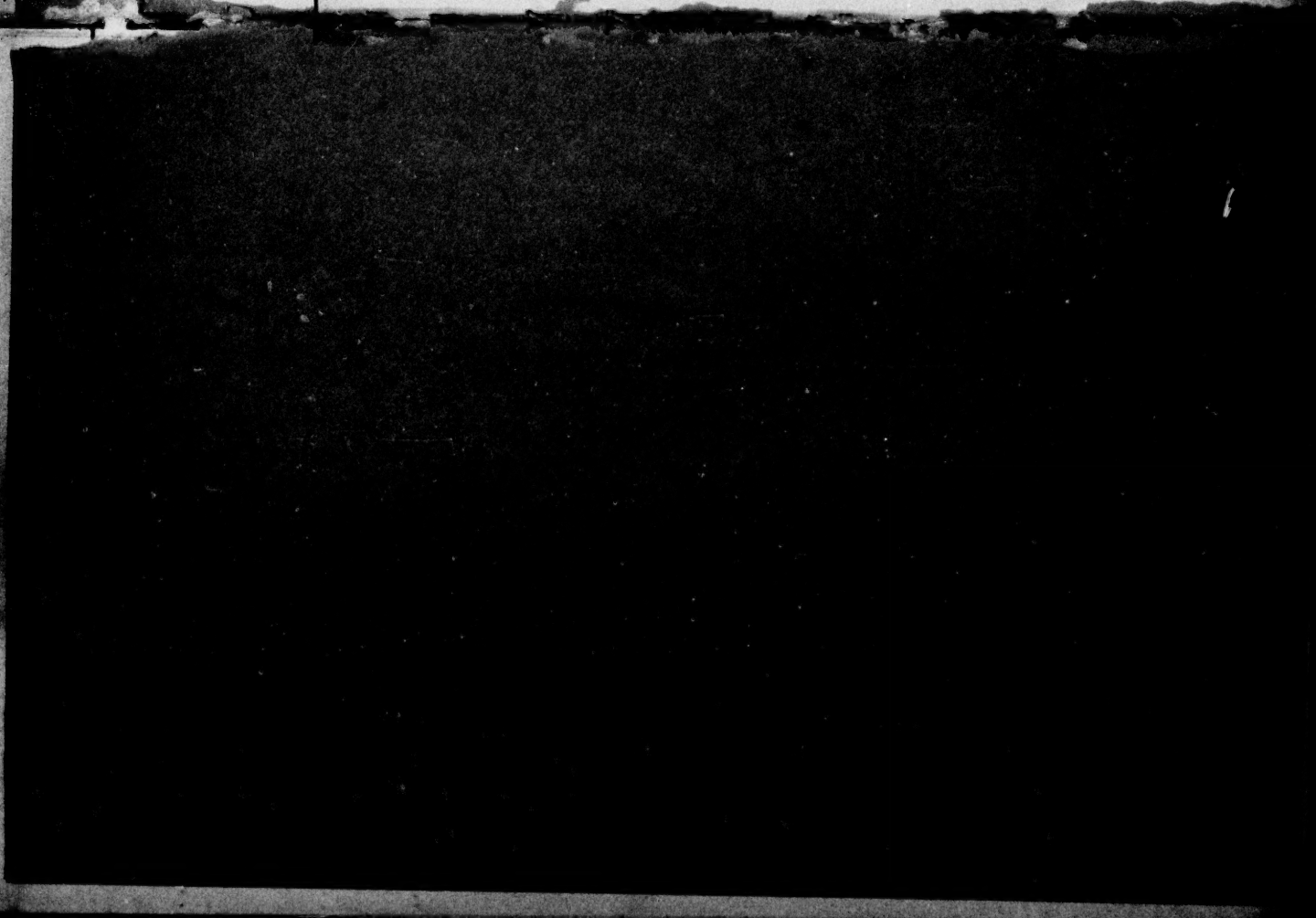

IN THE

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v.

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REPLY TO MOTION TO DISMISS, Etc.

I.

The motion to dismiss the writ of error is made, as asserted, "because it does not appear from the record "that the value of the matter in dispute, exclusive of "costs, exceeds five thousand dollars."

This is a mistaken assertion. The "matter in dis- "pute" is two sections of land, the value of which (ex-

clusive of costs) is twenty-four thousand dollars; and for this subject matter judgment has been entered in favor of plaintiff (defendant in error) and against the defendants, *jointly;* and jointly they have sued out the writ of error, and effected *supersedeas* of the judgment. That the defendants are adjudged, *also*, to pay $100 each, damages, is not material for consideration on this motion. The subject matter in dispute between plaintiff and defendants (plaintiffs in error) exceeds five thousand dollars in value, without this $100; and the action, in the nature of ejectment, is complete without either an allegation, a prayer, or a judgment for damages.

Defendants (the plaintiffs in error) made *offer* to prove certain facts, plaintiff objected, and the Court refused to admit the offered evidence. Plaintiff now seeks to make use of the evidence thus rejected to overcome the terms of the judgment sought, obtained and entered up to his own order and in his own favor, for the purpose of dismissing the writ of error sued out mainly because of this rejection. It is submitted that this can not be done. This evidence is not before the Court, and it is time enough to have plaintiff benefitted, and defendants prejudiced, by this evidence, when it is admitted and before the Court.

Plaintiff brought his action against defendants jointly for a subject matter of twenty-four thousand dollars in value; he obtained a judgment against them, jointly; and he has thus given defendants such a record as

entitled them to their writ of error, and a hearing thereon.

Railroad Co. *v.* Trook, 100 U. S. 112.
Lee *v.* Watson, 1 Wall. 337.
Walker *v* U. S., 4 Wall. 164.
Cooke *v.* Woodruff, 5 Cranch. 13.
Wise *v.* Columbian T. Co., 7 Cranch. 276.
Gordon *v.* Ogden, 3 Peters 33.
Smith *v.* Honey, id. 469.
Knapp *v.* Bangs, 2 How. 73.

II.

It is true, "the defendants moved that this action be "dismissed on the ground that the Court below had "no jurisdiction thereof, which motion was denied by "the Court."

The only allegation purporting to give jurisdiction (apart from the value of the land) is this: "Plaintiff "derives his title from a patent of the United States, "and defendants deny the validity of such patent."

This allegation, much less the evidence presented by plaintiff on the trial, does not give jurisdiction to the Circuit Court. It does not present a suit arising under the Constitution or laws of the United States. Nearly, if not quite, all titles are derived from patents, or some other mode of conveyance equivalent thereto, of the United States. That the defendants, in a prospective suit, deny the validity of the alleged patent,

presents no element of jurisdiction of the Circuit Court.

So it may be stated shortly, thus: If plaintiff has alleged or proved jurisdiction of the Circuit Court over this case, any person who claims to deraign title to land under a patent, or some other mode of conveyance equivalent thereto, of the United States, can bring his action in the Circuit Court to recover possession of such land. It is submitted that this can not be done.

So defendants do earnestly insist that this action should have been, and ought now to be, ordered dismissed by the Circuit Court for want of jurisdiction.

III.

As to the part of this dual motion, which asks that "the judgment of the Court below be "affirmed," the defendants say, that

Assuming that the affirmance of a judgment on the merits, brought here for review by writ of error, is a proper subject for a *motion*, it is certainly not this case.

This Court has decided that what plaintiff calls "a "patent of the United States" is not a patent; *that it was issued without authority of law;* that it confers upon him no title, ownership or right to the land therein described; that it is *void.*

Newhall *v.* Sanger, 92 U. S. 761.

And the Supreme Court of California has made similar decisions.

Carr *v.* Quigley, 57 Cal. 394.
McLaughlin *v.* Rowell, 50 Cal. 67-8.
McLaughlin *v.* Heid, 11 Pac. C. Law J. 80.
and other cases.

The sole ground on which plaintiff seeks to recover this land is, that on a certain day he "was the owner "in fee simple and entitled" of the land (Rec.). Defendants denied that allegation. So that is the vital issue. But when plaintiff made that allegation in his Complaint, he knew that he was not the owner or entitled of that land on the day named, or ever at any time; and he knew that the form of patent under which he thus pretended to be the owner was a *nullity*, i. e. that what he claimed under was in the form of, but was *not*, a patent. But he concluded that the form and written words of a patent have the same effect as a patent, in an action in the nature of ejectment; or to use more inaccurate but more expressive words, that a void patent is as good as a valid patent in a court of law. It is upon this ridiculous or astounding conclusion that plaintiff alleged himself to be the owner and entitled of the land sued for in this action.

Plaintiff objected to defendants' offered evidence on the ground, in substance, that a patent cannot be collateraly attacked in a Court of law. True. But the evidence was not offered for the purpose of attacking

a patent; but, it was offered to prove that there was *no* patent in existance to be attacked either directly or collaterally, and that what is in the form of a patent is not in truth a patent, but is void and of no effect.

In the charge to the jury, the learned Judge of the Circuit Court said (on the hypothesis that a void patent is as good as a [valid] patent in an action of ejectment), "The plaintiff has put in evidence the patent "of the United States, and claims title through that "patent to himself. That shows the legal title in "him," etc.

As has been shown, this instruction is directly contrary to law, as announced by this Court. It is due to the learned Judge to say that this instruction was given on the assumed ground, that in an action at law, where plaintiff claims title under a form of patent, the defendant cannot show that such form of patent is void. Of course, when the time comes to present this case on its merits, the defendants' expect to show to the satisfaction of this Court that such a rule of evidence does not prevail, and would lead to absurdities. And further, that it is not the province of this Court, and it will not assume the function, to change the ordinary elementary *rules of evidence* which are observed and govern in State Courts. This Court will rather follow than subvert such rules, and that it has always done so.

The pursuit of *truth* is the first office with which all Courts (should) concern themselves; and it should

form the foundation of all judgments. If plaintiff had stated the truth in his complaint in this case, it would run in substance thus: The C. P. R. R. Co. procured to be issued to it a form of patent, by the officers of the Land Department, for the land sought to be recovered; said land was reserved from the grant of lands to said Company, and said patent was issued without authority of law, and it is void and of no effect; it conveyed no title, ownership or right whatever to the land; I claim under it; and this being an action at law, I am the owner in fee and entitled to the possession of the land. Wherefore, etc.

So the instructions of the learned Judge to the jury are subject to the same remarks.

In many of the cases where the Courts have held, that a patent which conveyed the title can not be attacked collaterally in an action at law, where the legal title alone is sued upon and must prevail, they have frequently seen fit, although not called upon directly to do so, to state the distinction between a patent which conveyed the title, whether erroneously issued or not, and one which conveyed no title, and to state that, whenever a patent is issued without authority of law, or for lands reserved, etc., it is void for want of authority or jurisdiction in the officer issuing it, and that it can be attacked whenever presented as evidence of what, in truth, it is not—a patent.

This Court has frequently spoken in this way. Thus:

In *Polks Lessee* v. *Wendell*, 9 Cranch. 87, it is said through Chief Justice Marshall: "There are cases in "which a grant is absolutely void, as where the State "has no title to the thing granted, or where the officer "had no authority to issue the grant. In such cases, "the validity of the grant is necessarily examinable at "law."

In *Patterson* v. *Winn*, 11 Wheaton 380, it is said: "We may therefore assume, as the settled doctrine of "this Court, that if a patent is absolutely void on its "face, *or the issuing thereof was without authority*, or "was prohibited by Statute, or the State had no title, "it could be impeached, collaterally, in a Court of law "in an action of ejectment."

In *St. Louis Co.* v. *Kemp*, 104 U. S. 636 (cited by plaintiff), it is said: "Of course, when we speak of "the conclusive presumptions attending a patent for "lands, we assume that it was issued in a case where "the department had jurisdiction to act and execute it. " * * If they (the lands) never were public prop- "erty, or had previously been disposed of, or if Con- "gress had made no provision for their sale, *or had re- "served them*, the Department would have no jurisdic- "tion to transfer them, and its attempted conveyance "of them would be *inoperative and void*, no matter "with what seeming regularity the forms of law may "have been observed. * * * Matters of this kind, "disclosing a want of jurisdiction, may be considered "by a Court of law." And after commenting some-

what as to the distinction between a patent irregularly or erroneously issued, and a patent that is void, it is said: "So, also, according to the doctrine in the "cases cited, if the patent be issued without authority, "it may be collaterally impeached in a Court of law. " * * * A patent may be collaterally impeached "in any action, and its operation as a conveyance de- "feated, by showing that the Department had no juris- "diction to dispose of the lands; that is, that the law "did not provide for selling them, or that they had "been *reserved*," etc. But as to the case itself, the Court say: "It does not come within any of the ex- "ceptions mentioned in the cases cited."

The deduction from all the cases may be stated thus: When the plaintiff in an action of ejectment relies on a patent, and alleges title as the ground for recovery, the defendant cannot, under a naked denial of plaintiff's title, give evidence in a Court of Law that the patent was irregularly, erroneously, or even fraudulently issued, provided it is admitted or appears that the patent conveyed the title; because the legal title, no matter how vested in plaintiff, will prevail in such an action. But, for the very same reason, if defendant's evidence shows that the patent is *void*, that it is only a patent in form, but not in fact, and did not convey the legal title, such evidence is admissible; because it shows that plaintiff has not the essential thing upon which alone he can recover—*the title*, and it is square-

ly in support of defandant's denial of plaintiff's being entitled.

As we have shown, this has always been the rule in this Court; and the rule in California, where the land in controversy is located, since

Summers *v.* Dickerson, 9 Cal. 556,

and the citations already made.

IV.

Plaintiff is making an unconscionable use of this form of patent.

By the Acts of Congress of July 1, 1862 (12 U. S. Stat. 492), and July 2, 1864 (13 id. 358), the odd numbered sections of *public land* were granted to the W. P. R. R. Co., within 20 miles on each side of its road, *excepting* such of said odd sections, as should, at a designated time, contingent upon the action of the Company itself, be, 1st, sold; 2d, reserved; 3d, otherwise disposed of; 4th, under claim of pre-emption; 5th, under claim of homestead; and 6th, mineral.

Seemingly, the Railroad Co. procured the officers of the Land Department to act under these Acts of Congress, as if there were no land at all excepted from the grant.

A patent similar in all respects to the one under notice in the case at bar was presented in *C. P. R. R. v. Yolland*, 49 Cal. 444, and it was there said, "the par-"ties in interest, it may be assumed, will apply to the "appropriate tribunal, the Supreme Court of the United

"States for a final determination of the question." And in a short time the same form of patent was presented to this Court for such purpose; and it was finally determined that the patent (so called) was void (*Newhall v. Sangers, supra*). This decision applies to the 2d exception from the grant, and rules the case in hand. Since that time (Oct., 1875), plaintiff knows he has no title or claim to the land sued for.

Subsequently, a form of patent was presented for lands belonging to the 6th exception, under the terms of the Acts, *i. e.* mineral, in *McLaughlin v. Powell*, 50 Cal. R. 64; and that patent (so called) was declared void.

Once more, but in a new form of action, the same form of patent now before the Court, was presented in *McLaughlin v. Fowler*, 52 Cal. R. 203, and once more it was held void.

In three other cases in quick succession the same and similar forms of patent were declared void. (Carr *v.* Quigley, 57 Cal. 394; S. P. R. Co. *v.* Crampton, 9 P. C. L. J. 774; and McLaughlin *v.* Heid, 11 Pac. Coast L. J. 80.)

Thereupon, plaintiff shifted his field of action from the State Courts into the U. S. Circuit Court, which refuses to follow the rule of evidence followed in the State Courts, or allow proof that this form of patent is void, and thereby gives it an effect which it has not, and the very contrary to that given by this Court, as well as the Courts of the State. And with the intent

to remain solely in the Circuit Court, where plaintiff is receiving the advantages of a full title to lands to which he has no title at all, this motion to dismiss the writ of error is made, so that the case may not come under the light of a decision from this Court. For the sake of *justice*, at least, we hope the motion will not prevail.

Counsel for Plaintiffs in Error.